Civil Liability as a Professional Competence Incentive

Prepared by
Edward P. Belobaba
for
The Professional Organizations Committee

This working paper was commissioned by
The Professional Organizations Committee,
but the views expressed herein are those of the author
and do not necessarily reflect the views of the
members of the Committee or of the Research Directorate.

Working Paper
#9

CIVIL LIABILITY AS A PROFESSIONAL COMPETENCE INCENTIVE

A Study of the Effectiveness of the
Civil Liability Mechanism as an
Incentive for Continuing Competence
in Four Ontario Professions:

Accounting, Architecture, Engineering and Law

A Working Paper Prepared by

Professor E.P. Belobaba
Osgoode Hall Law School
York University

for

The Professional Organizations Committee

1978

ISBN 0-7743-3418-5

TABLE OF CONTENTS

A. INTRODUCTION AND OVERVIEW

This paper examines the effectiveness of the civil liability mechanism as an incentive for maintaining competence in four Ontario professions: accounting, architecture, engineering and law.[1] For the purposes of this paper professional competence includes both care and skill.

> "Professional(s) . . . are required not only to exercise reasonable care in what they do, but also to possess a minimum standard of special knowledge and ability."[2]

Care refers to the effort and the time taken by a practitioner of given competence in supplying his or her professional services. Skill has been described as "that special competence which is not part of the ordinary equipment of the reasonable man, but the result of aptitude developed by special training and experience."[3] This paper concludes that civil liability can provide an effective competence incentive in both of these important respects if certain recommendations for reform are implemented.

The paper proceeds as follows. Part B provides a theoretical perspective of the civil liability mechanism as a competence incentive. The various factors that can potentially detract from the mechanism's overall effectiveness in this regard are described. Each of the four professions is then examined in Part C with a view to identifying the extent to which these constraints are present in the actual practice

of the particular profession. An overall evaluation and conclusion is provided in Part D, and the recommendations for reform are itemized in Part E.

The concern of this paper is of course related to two other studies being undertaken for the Professional Organizations Committee. One is Professor Barry Reiter's study of the professions' disciplinary mechanisms and the other is a study of issues of re-certification and continuing education.[4]

****

B. CIVIL LIABILITY AND PROFESSIONAL COMPETENCE: A THEORETICAL PERSPECTIVE

1. Civil Liability and Deterrence

The characterization of civil liability as a market-incentive form of deterrence, and thus a significant mechanism for encouraging minimum standards of competence in the delivery of professional services, should not, in theory at least, be doubted. As Professor Prichard explains:

> "Civil liability should stimulate both care and competence. The stimulus is the threat of an award of damages against the professional and the stigma in both the profession and the community of a judicial determination of fault."[5]

Serious doubts about the civil liability sanction as a viable competence incentive are, however, being voiced. The current crisis in American malpractice insurance has unleashed a literature that abounds with diametrically opposed evaluations of the professional malpractice action and its relationship to continuing competence.[6] One commentator has suggested that "good doctors practise good medicine in spite of,not because of,the threat of malpractice"[7] and that "it is questionable whether a deficient or careless doctor can be made to practise good medicine by an external threat."[8] Similarly, Ontario's Committee of the Healing Arts made the observation that, at least in the U.S., the malpractice action had reduced the quality and medical care and that "for all intents and purposes, the malpractice action may be ignored in any realistic assessment of the adequacy of existing controls."[9] A diametrically opposite point of view was taken by a California Select Committee on Medical Malpractice:

> "At the present time, malpractice litigation is clearly the most significant external pressure prompting physicians to practice quality medicine."[10]

The controversy cannot be resolved in the absence of careful empirical research. Unfortunately the research to date has yielded conflicting results. A study conducted in 1962 by Professors Schwartz and Skolnik found that a malpractice judgment had no adverse effect upon the doctors' practices and that, indeed, in some cases the practices improved.[11] In 1977, however, Professor Reder's economic analysis of medical malpractice cases[12] demonstrated that the deterrent effects of professional civil liability are quite substantial. His study found that "doctors invest in training in order to limit the risk of penalty for unsatisfactory performance and invest more the greater the expected penalty."[13]

Where does one go from here? The most that can be said at this stage of the debate is that there is indeed a genuine uncertainty about the relationship between civil liability and continuing professional competence. And it may well be that much of the dissatisfaction with the civil liability mechanism is a more general dissatisfaction associated with the overall inadequacies of the malpractice action as a compensation vehicle. It is certainly beyond dispute that the personal fault-oriented malpractice action is an extremely inefficient method for compensating victims of professional accidents.[14] Thus, if compensation was the sole reason for the use of the civil liability mechanism, one would be quite justified in joining the chorus of criticism. But compensation is not the only rationale for the malpractice action. As

Professor Keeton explains:

> "Law generally, and tort law particularly, must accommodate multiple interests and objectives. No one principle relentlessly pursued will achieve an acceptable accommodation."[15]

The malpractice action and the consequent potential for civil liability in the form of a damages award perform an important economic function that stands apart from any compensation rationale: the deterrence of non-cost-justified accidents.[16] Even Professor Calabresi who has subjected the "stigma-spewing approach"[17] of the malpractice action to his rigorous scholarship concedes the following:

> "I am not convinced that we can readily ignore the possibility that financial incentives established through the allocation of liability for [professional] maloccurrences are important to the achievement of that level of . . . care that our society desires."[18]

The reason why few, if any, of the commentators that have registered their dissatisfaction with the civil liability mechanism would argue for its wholesale abolition in the context of professional regulation is simply stated: the alternatives might prove to be more deficient. Thus at the end of the day the relevant question achieves a sharper focus:

> "The question is not whether the other means of control are more or less effective than tort law . . . the question is whether they are <u>so effective</u> as to make tort law superfluous or whether tort law may have a place as a complementary system of control . . .".[19]

What are the alternatives to the victim-initiated, externally imposed civil liability sanction? Professor Reiter's paper and the working paper on re-certification explore the relative effectiveness of two internal regulatory mechanisms: discipline and continuing education. They conclude that exclusive reliance upon these internal or self-regulatory mechanisms will not achieve the optimal solution to the continuing competence problem.[20] Other writers have reached the same conclusion: internal professional regulation per se does not ensure adequate minimum standards for skills, methods or performance.[21] Ivan Illich makes the same point but more dramatically:

> "Professional self-policing is useful principally in catching the grossly incompetent--the butcher or the outright charlatan. But as has been shown again and again, it only protects the inept and cements the dependence of the public on their services."[22]

Although the paper by Professor Reiter provides important insights relating to the reform and overall improvement of the internal mechanisms that are properly concerned with continuing competence, the need for a complementary external competence-incentive is recognized.[23] Or, putting the point differently:

> "The professions would do well to refrain from claiming total supervision of the processes for dealing with [professional] incompetence. The public is now too wise to allow the fox to guard the henhouse."[24]

In sum, given the apparent absence of any superior, alternative mechanism, civil liability should in theory play an important role in the supervision and maintenance of professional competence. The important question, however, is whether the civil liability

mechanism, will in fact vindicate its theoretical prescription, when it is forced to operate in the real world of professional practice. This depends on a great many factors or determinants that stand ready to influence, impede and generally detract from the theoretical effectiveness of the civil liability mechanism.

In order to understand better how the civil liability sanction operates in each of the four professions under study, the range of variables that could constrain or indeed cripple the civil liability mechanism will be briefly surveyed.

2. Factors Limiting the Effectiveness of the Civil Liability Mechanism

Various constraints exist in the context of actual professional practice that detract from the effectiveness of civil liability as a competence incentive. Because this incentive is mainly financial, it follows that two of the major determinants of effectiveness will be (1) the nature and extent of the profession's liability insurance scheme and (2) the degree to which a competitive market exists in the delivery of the profession's services. There are, however, other factors as well. The effectiveness of the liability sanction is dependent upon a wide range of variables scattered throughout the litigational and post-litigational process. These factors can be grouped and described as follows: (1) factors affecting victim-initiative (i.e. injury recognition and its attribution to professional incompetence);

(2) factors relating to the adjudication process (i.e. the scope and content of the liability rules and the procedural prerequisites); (3) factors affecting the financial impact on the individual professional defendant (i.e. the nature and extent of liability insurance); (4) factors reflecting the response of the profession as a whole (i.e. the nature and extent of the initiative displayed by the profession's governing body). Each of these four categories deserve a brief amplification.

(1) Factors Affecting Victim-Initiative

Civil liability is a private enforcement mechanism. It relies exclusively on victim initiative.[25] Whether or not this mechanism can be an effective competence incentive for a particular profession will depend at the outset upon the sophistication of the clientele being serviced by that profession. Several questions are relevant. How informed is the clientele? Is the "victim" of a professional's incompetence able to recognize an "injury?" Is he or she able to attribute the injury to professional negligence? The recognition and attribution factors are of paramount importance. "To the extent that the victim is unable to identify and evaluate his injury, the [civil liability] mechanism fails both because only a portion of the potential meritorious suits will be brought and those that are brought will arise in a haphazard manner."[26]

Even if the victim manages the identification and attribution hurdles, there are other impediments. Will he be able to find counsel? Is it difficult to find lawyers who are willing to counsel a malpractice action against other professionals? Against other lawyers? And what about the costs barrier? Do the costs

rules encourage or discourage meritorious suits? To what extent are contingent fee arrangements permitted? And, finally, are there any difficulties in collecting and presenting the necessary evidence? To what extent does a "conspiracy of silence"[27] prevail in the particular profession?

(2) Factors Relating to the Adjudication Process

Once the professional malpractice action has been instituted and the court has assumed its traditional adjudicative function, several more variables can materialize to limit the effectiveness of the civil liability mechanism. In this context the relevant factors that deserve examination are both substantive and procedural. An important example of the former are the court-imposed liability rules that set out the standard of care expected of the allegedly negligent professional. In general terms the standard of care that is relevant to the practice of accountancy, architecture, engineering or law--indeed all professions--is the same and has been stated as follows:

> "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill."[28]

The general test of what is a "reasonable degree of care and skill" is that displayed by the average practitioner in the particular profession. And, as Professor Glos explains, "the standard may vary from calling to calling depending on the degree of knowledge and perfection attained in the particular calling."[29] This means

that the nature and the extent of the civil liability potential may vary quite dramatically from profession to profession. In the examination of this issue in the context of accountancy, architecture, engineering and law it will be instructive to ask the following questions: How has this general standard of care been applied in fact? Broadly? Narrowly? How wide is the scope of scrutiny? Are any of the professions immunized from liability for certain types of otherwise negligent conduct on grounds of "public policy"? To what extent have any of these factors limited the effectiveness of the civil liability mechanism as a competence incentive?

Closely related to these substantive aspects of the adjudicative process are several procedural factors: (1) the extent to which privity of contract is a prerequisite for the imposition of civil liability for professional negligence and, (2) the extent and judicial interpretation of the limitation periods that have been statutorily imposed to expedite civil litigation. Again, the relevant question to ask in the context of each of the four professions under study is whether these factors have in fact limited the effectiveness of the civil liability mechanism.

(3) The Individual Defendant and Liability Insurance

Finally one comes to one of the most important determinants of effectiveness: professional liability insurance. Even if the malpractice action succeeds and the defendant is found civilly liable, the all-important financial incentive will be minimized and, possibly, eliminated if the professional is able to insure

against the damages award.[30] This is not to say that every insurance package carried by an accountant, architect, engineer or lawyer will have this effect. Whether or not the particular insurance scheme will in fact frustrate the incentive-rationale of the civil liability mechanism will depend on a number of specific factors: Is it a mandatory insurance plan? Are the premiums risk-rated?[31] Is there a substantial, uninsurable deductible requirement?[32] The examination of the insurance packages carried by accountants, architects, engineers and lawyers will emphasize the importance of these variables. To the extent that a particular insurance plan employs a non-experience premium rating or permits a nominal or non-existent deductible, the financial incentive rationale of the civil liability mechanism as a means of encouraging or continuing competence is virtually eliminated.

(4) Factors Affecting the Response of the Profession as a Whole

To achieve optimal utility, the civil liability mechanism must trigger a competence response not only at the individual level but at the level of the profession as a whole. Continuing professional competence is unattainable unless the incidents of individual professional malpractice can be collected, identified and evaluated in a systematic manner in order to provide the necessary direction for the implementation of loss control seminars or continuing education programs.[33] Several factors are at play here. First, there is the profession's attitude towards compulsory insurance. With a universal-mandatory insurance scheme the

requisite claims and loss-by-origin data is not only more easily attainable but reflects more accurately the total incidence of malpractice.

Second, it is relevant to ask whether the profession's insurance arrangements include a substantial self-insurance component. To the extent that the profession as a whole undertakes a significant self-insurance arrangement, the incentive for stricter scrutiny and appropriate corrective efforts is increased.

Third, and of paramount importance, is the nature and the extent of the inter-relationship between the profession and its insurance carriers. Does the insurance carrier provide the profession with all the data that is necessary for effective loss control? Are the claims files systematically reviewed with a view toward professional education? Has a loss control program been instituted? Are loss control bulletins distributed in order to advise the profession of recent developments or particularized problems?

The fourth and final factor that can limit the effectiveness of the civil liability mechanism as a competence incentive for the profession as a whole is the nature and extent of the profession's disciplinary proceedings. The effectiveness of the civil liability mechanism is increased if the disciplinary body views professional incompetence as a matter properly falling within its jurisdiction and acts accordingly.

Given this theoretical overview of the relevant factors that can limit the effectiveness of the civil liability sanction, one can now proceed to an examination of the civil liability mechanism as it actually operates in the practice of accountancy, architecture, engineering and law.

****

C. THE CIVIL LIABILITY MECHANISM IN PRACTICE

1. The Accounting Profession

It should be made clear at the outset that this discussion of civil liability and the professional competence of Ontario accountants will have a fairly narrow focus. Because the primary concern is public liability and its consequences, it follows that the examination of the liability mechanism will be restricted to that part of the accounting profession that is licensed to practice public accountancy.[34] Although there are seventy-one licensed C.G.A.'s within this category (as of February 1978),[35] the professional group that attracts primary attention are the Chartered Accountants.[36]

Among Ontario C.A.'s, professional liability has not yet achieved the near-crisis dimensions that now plague the C.P.A.'s south of the border. In the U.S., of course, professional liability has been a matter of serious concern to accountants for several years. The American Institute of Certified Public Accountants reports that the future for professional liability is less than rosy.[37] Liability awards of five or ten million dollars or settlements as high as $30 million are no longer unusual.[38] The number of C.P.A.'s in private practice is growing,[39] premiums have been doubling[40] and federal scrutiny of the profession has been increasing.[41] The chairman of the House Commerce Sub-committee on Oversight and Investigations has recently issued this warning to American C.P.A.'s:

> "If the accounting profession cannot adduce persuasive evidence that it is taking effective steps on its own to

> improve the quality of its audit work and the responsiveness of accountants to public needs, [I will] introduce legislation in Congress to create a self-regulatory organization under direct SEC oversight."[42]

Fortunately the concern over professional liability has not achieved these same proportions in Ontario. Indeed in 1970 the ICAO's Special Committee on Professional Incorporation and Professional Liability concluded that liability insurance was amply available and the overall situation was "satisfactory".[43] The situation has deteriorated considerably in the last several years with the ICAO feeling, in part at least, the impact of the American professional liability crisis. This point will be amplified in the discussion of insurance.[44] The more immediate concern is to examine the effectiveness of the civil liability mechanism as a competence incentive for Ontario accountants. The theoretical perspective described supra in Part B will be employed.

(1) Victim-Initiative Factors

(i) Client Sophistication. To what extent is the victim able to (a) recognize the existence of injury and (b) conclude its cause to be professional negligence? The number of accountant malpractice actions that have been reported in Ontario would suggest a remarkably unsophisticated clientele: only four such cases since 1960.[45] And of the four, three were brought by fairly large corporate plaintiffs. But this cannot be a meaningful measure of victim-initiative or client sophistication for two reasons: (1) a sizeable number of malpractice

actions may go unreported and (2) an even larger number may be settled out-of-court. For this reason it is suggested that a more accurate measure of victim-initiative potential would focus on client type and client behaviour. The survey data compiled by POC research teams is particularly relevant.

The data show that on average over 90% of the C.A.'s billable time is devoted to business clients and only 4.5% to individuals.[46] Whether the firm has only one C.A. or 150 C.A.'s, business clients account for 87.2% to 92.6% of the firm's gross and individuals from 2% to 8.7%.[47] To the extent that business clients are better informed with respect to financial matters than most individuals, they are better able to clear the "recognition" and "attribution" hurdles discussed earlier. The POC data describe an accounting clientele that is on balance fairly well-informed: (1) most of the respondents to the survey felt that they had adequate information available to them when selecting an accountant;[48] (2) more than half of those surveyed felt that they were able to qualitatively evaluate their accountant's work;[49] (3) although most of the respondents were satisfied with the accountant's services, a substantial portion of the 37% that had encountered some problems in their dealings with accountants were sufficiently well-informed to switch firms.[50]

(ii) Other Factors. The other factors affecting victim-initiative explained in Part B were (1) the difficulty in obtaining legal counsel interested in taking a professional malpractice case, and (2) the costs barrier. Neither of these factors is

significant in the instant context. The experience to date both in the U.S. and in Canada suggests an ample supply of lawyers that would litigate an accounting malpractice action as they would any other civil suit. As for the costs barrier, it is less of a problem where, as here, the typical client-plaintiff would be able to deduct legal fees as an expense of doing business. The contingent fee arrangement, although attractive in principle,[51] is not as important a vehicle here as it may be in our examination of architecture, engineering or law.[52]

(2) Factors Relating to the Adjudication Process

(i) The Standard of Care. As noted earlier, the judicially-imposed standard of care for Ontario C.A.'s is "the care and skill to be fairly expected from a practitioner of reasonable competence."[53] The Special Committee on Professional Incorporation and Professional Liability described the nature of the more typical negligence claims that are made against a public accountant:

> "The most usual claims which may be made against a public accountant, not necessarily in order of their size or importance, include:
>
> 1. Auditing deficiencies as a result of which --
>
> (a) defalcations were not detected;
>
> (b) overstatement of assets or understatement of liabilities were not discovered.
>
> 2. Failing to ensure that proper accounting principles have been applied, as a result of which --

(a) improper balance sheet or income statements were issued;

(b) inadequate disclosure of information or inadequate supplementary information by way of footnote failed to make the statement clear, where he has not qualified or disclaimed an opinion.

3. The advice which was given was wrong (e.g. in taxes or management consulting).

4. Failing to file returns or report information known to the auditor."[54]

The need for a flexible yet rigorous standard of care and the judicial tendency to demand more of the "reasonably competent practitioner" can be explained as follows:

> "Modern accounting techniques have created a vast broadening of "reasonable" accounting methods and thus have fostered greater opportunities to mislead the public. The "generally accepted accounting principles" that underlie all corporate financial statements are now so numerous and vague that even the most closely-scrutinized financial statements can be misleading. As the accounting profession becomes increasingly enmeshed in complex problems involving a plethora of valid techniques to achieve their solution, however, its responsibility to serve the public interest and, thus the potential scope of its liability, has grown accordingly."[55]

The 19th century judicial caution that an accountant "is a watchdog but not a bloodhound"[56] has yielded to the demands of 20th century finance. The recent decision of the Supreme Court of Canada in Haig v. Bamford[57] reflects the conscious judicial shift toward stricter scrutiny. As Dickson J. explained:

> "The day when the accountant served only the owner-manager of a company and was answerable to him alone has passed. The complexities of modern industry, combined with the effect of specialization, the impact of taxation, urbanization, the separation of ownership from management, the rise of professional corporate managers, and a host of other factors, have led to marked changes in the role of responsibilities of the accountant, and in the reliance which the public must place upon his work . . .
>
> With the added prestige and value of his services has come, as leaders of the profession have recognized, a concomitant and commensurately increased responsibility to the public."[58]

(ii) Liability to Third Parties. In Haig v. Bamford[59] the Court adopted the reasoning employed in Hedley Byrne v. Heller[60] and unanimously accepted the view that a public accountant owes a duty of care not only to those who employ him but also to that "limited class"[61] of third parties that the accountant knows will rely on his report.[62] Although the Supreme Court stopped short of declaring that it favoured liability in negligence up to the full limits of foreseeability, the decision in Haig v. Bamford[63] is nonetheless significant. The ICAO has recently suggested that Haig "indicates a drift very much towards 'liability for an indeterminate amount for an indeterminate time to an indeterminate class'".[64] This may be somewhat of an overstatement but one cannot deny the accuracy of the following ICAO observation:

> "The unmistakeable trend in the common law is an evolution towards increased exposure to third-party liability on the part of public accountants."[65]

As one commentator has noted:

> "The Haig decision undoubtedly will encourage further exploration of the limits of liability to third parties for negligence and error and will impose both a heavier duty of care and a more onerous financial liability on persons carrying on a profession and whose reports are relied upon by persons other than those with whom they have a direct contractual or fiduciary relationship."[66]

(iii) Limitation Periods. The Haig decision is also relevant to a discussion of whether or not any statutorily imposed limitation periods could detract from the effectiveness of the civil liability mechanism as a competence incentive. In Ontario the general limitation period for actions in contract or tort is six years,[67] and the generally accepted rule is that time starts to run when the cause of action is complete.[68] Since most professional negligence actions are said to lie in contract[69] and since the cause of action is complete when the contract has been breached,(i.e. when the negligence occurs),the six-year limitation period may impose some hardship in those cases where the injury is only discovered after the statutory period has passed. These cases will occur less frequently in the context of accounting than in any of the other professions under study simply because there is a greater immediacy to the client's quality evaluation of the services rendered. Audits, for example, are conducted annually. Serious irregularities would in all likelihood materialize in the succeeding audit and certainly within six successive audits. And, with respect to non-client or third party reliance injuries, since the

basis of the action--negligent mis-statement--is tortious, the limitation period will not start to run until the financial injury occurs in fact.[70] Thus, for accountants at least, the limitation factor is not a significant constraint on the effectiveness of the civil liability mechanism as a competence incentive.

(3) The Individual Accountant and the Insurance Factor

We have already suggested that the existence of a professional liability insurance plan could play a crucial role in determining effectiveness of the civil liability sanction in the context of that profession.[71] What is the situation with respect to C.A.'s in Ontario?[72] Although we do not have access to all the necessary data, the following points can be made:

(i) Professional Liability Insurance. First of all, liability insurance is not compulsory.[73] The ICAO, in conjunction with the Canadian Institute of Chartered Accountants, offers a group insurance plan available in amounts from $100,000 to $10 million with no deductible. The plan is underwritten by Lloyds of London and marketed in Canada through J.H. Minet & Co. The Lloyds-Minet plan has only been in operation for three years. Their predecessor was General Secruité Lteé of Montreal.

Of the 1200 "firms" practising public accounting in Ontario, 681 are participating in the Lloyds-Minet plan.[74] It should be made clear that many of the larger firms, because

of their size and the peculiar ramifications of international practice, carry "custom made" policies, some with Lloyds-Minet, some not. For the 681 firms covered under the Lloyds-Minet plan a breakdown of the level of coverage by the number of firms is as follows:[75]

Level of Coverage	Number of Firms	%
$ 100,000	143	21
500,000	272	40
1,000,000	191	28
2,000,000	54	8
5,000,000	14	2
10,000,000	7	1
	681	100

Since a majority of Ontario C.A.'s are covered under the Lloyds-Minet plan and since very little is known about the other insurance carriers, it may be instructive to consider the scope and content of this prevalent insurance package. Under the Lloyds-Minet policy an accountant is insured against all claims arising out of any error or omission, negligence, breach of contract or warranty of authority, breach of trust if committed in good faith, libel, slander or defamation of character.[76] It is a "claims made" type of insurance policy as opposed to the more traditional "occurrence" policy. A "claims made" policy limits coverage to claims that are actually made within the term of the policy. This is in contrast to occurrence-type policies which provide coverage for all claims arising out of errors or omissions committed during the term of the policy. The primary advantage of the claims-made policy is to the insurer in that it removes the uncertainty over the adequacy of current rates

by reducing the long-tail effect of most malpractice claims.[77] A substantial disadvantage is suffered by the insured professional since he will have to maintain coverage even after leaving professional practice. The growing crisis in North American professional liability insurance has standardized the "claims made" feature for the four professions under study.

(ii) Premiums and Rating. To what extent are the premiums risk or experience rated? Lloyds-Minet has distributed a "self-rating table"[78] which suggests that the only criterion utilized in the calculation of one's annual premium is size of firm. Thus a one-man operation would pay $212 per annum for the basic $100,000 coverage and a ten-man firm would only pay $117 per accountant for the same level of coverage.[79] Other combinations of coverage level and firm size are also provided or easily calculable. It is important to note, however, that although 94% of all policies issued in 1976 by Lloyds-Minet used only a size criterion for premium-rating, some (i.e. 6%) were individually rated. As the CICA informational brochure explained:

> "Firms with certain consulting arrangements, international involvement, or a history of actual or possible claims may be offered amended policies at higher but competitive rates."[80]

The six per cent that were individually rated had this reflected in the specific alterations to the policy, e.g. size of premiums, deductibles and cancellation clauses.[81]

(iii) Claims History. Finally it is instructive to describe briefly the Lloyds-Minet claims history. Data obtained from the ICAO reveals the following: (1) the last eight years have yielded only 46 claims of which 36 are still open; (2) the claims by origin suggest that the three main areas of alleged negligence are accounting errors, undetected defalcations and income tax matters; (3) the total amount reserved or paid out is $312,323; (4) the average claim size is $6,789.63; (5) in the last five years the average claim size has increased by less than $600.[82]

Notwithstanding this fairly impressive claims history, the Insurance Committee of the ICAO is currently experiencing considerable difficulty in re-negotiating a similar package with Lloyds for the future. It appears that the deterioration of the professional liability insurance market in the U.S. has had serious repercussions at the international re-insurance level and these repercussions will soon be felt by Ontario accountants. The ICAO will have no difficulty in locating an underwriter (Lloyds and others have expressed interest); the difficulty will be in their efforts to avoid substantial premium increases and higher deductibles. At time of writing, these negotiations were still continuing.[83]

(4) Factors Affecting the Response of the Accounting Profession as a Whole

This paper has already suggested at least four factors that would affect the degree to which the profession would collectively respond to the impact of civil liability sanctions and thus increase their overall effectiveness as competence incentives: compulsory liability insurance, the extent of any self-insurance component, the relationship with the insurance carrier and the jurisdiction of the profession's disciplinary body.[84]

(i) Compulsory Insurance. This question was considered in 1970 by the Special Committee on Professional Incorporation and Professional Liability. The Committee concluded that on balance "there is no need at this time to have compulsory insurance for all practising accountants."[85] Their reasoning was as follows:

> "We have considered the possibility of having a compulsory group plan for all chartered accountants in Ontario. This would have the advantage of ensuring that coverage would be available to all members and if the underwriter of the present group plan were denying coverage to many members on the basis of selective risk, there might be advantages in this. So far as we could ascertain, however, this situation does not exist.
>
> "We have also considered the possibility that compulsory insurance may increase litigation as the public would know that the insurance company stood behind any claim which might be successful.
>
> "It should be noted that in addition to protecting members, liability insurance is a protection to the public in that if a member is found negligent, there is then assurance that there will be a source of funds available to meet the claim. We are not aware

> that there is any public demand for such insurance, and in the absence of such demand it would seem unnecessary to burden our members with a requirement to take out insurance in cases where the nature of their practice was such that they felt coverage was unnecessary, but undoubtedly the magnitude of risk varies with different practices and a compulsory group plan must necessarily result in some members being forced to carry more insurance than they think is warranted."[86]

The Special Committee did, however, urge those accountants not yet insured to "consider the advantages of the Ontario Institute group plan."

(ii) A Self-Insurance Component. The group insurance plan provided by Lloyds-Minet has no self-insurance component. ICAO has not followed the lead of the Law Society of Upper Canada[87] in this respect. One member of the ICAO Insurance Committee has suggested that Ontario C.A.'s by and large prefer the external and perhaps "more objective" appraisals of an insurance company to an insurance arrangement requiring "peer evaluation."[88]

(iii) The Relationship with the Insurer. It is fair to say that the governing bodies both at the provincial level (ICAO) and at the national level (CICA) have some access to the necessary claims data. The Insurance Committee of the CICA, for example, meets regularly to review the data provided by Lloyds-Minet for the purpose of planning appropriate professional development and loss prevention programs.[89] A systematic loss control program has not yet been implemented although the

possibility of regularized bulletins and loss control seminars is being seriously considered.[90]

(iv) Competence and Discipline. Professor Reiter's paper provides an extensive analysis of the ICAO's disciplinary body and its mandate with respect to professional negligence and general incompetence problems.[91] Members are statutorily required to report any finding of probable incompetence to the Institute's disciplinary body. The body is empowered to investigate the report, determine the nature and extent of the alleged incompetence, and order the appropriate corrective action. In short, professional incompetence appears to be a matter that is taken quite seriously by the disciplinary body.[92]

2. Architects and Engineers

For the purposes of this paper, the architecture and engineering professions (although otherwise quite distinct)[93] will be discussed together. The reason is two-fold: (1) many of the factors that are relevant to our discussion of the civil liability mechanism as a competence incentive are common to both professions;[94] (2) the liability insurance plan that is carried by most of the architects and engineers that are in private practices,[95] is one and the same.[96] Where, however, differences do arise in the two professions with respect to the civil liability mechanism, these will be noted.

Generally speaking, of the four professions under study, architects and engineers have probably expressed the greatest concern about professional liability. More than any other profession (with the exception of medicine) architects and engineers have experienced the largest increases in the volume and size of professional liability claims in recent years.[97] In 1967, for example, the incidence of architectural malpractice was one claim for every 18 policies in force; by 1977 the claims frequency had increased to one claim for every three policies in force.[98] A less dramatic but still significant escalation in claims experience is reflected in the engineers' data: in seven years the ratio of claims to policies has climbed from one in ten to one in three.[99] Fortunately, the average cost of each claim has not escalated.[100] And, in the overall, the Ontario picture is nowhere near as bleak as that in the U.S. where the average claim value has jumped 56% in ten years[101] and the overall incurred loss

figure was nearly seven times larger than the same figure a decade earlier.[102]

What accounts for these dramatic increases? According to the professions' national insurer:

> "Clients, contractors and third parties are becoming more litigious. This has resulted in a drastic increase in malpractice claim frequency during the last few years. . . Simultaneously we have also witnessed an increase of 100% in the average cost of each of these claims. Inflation is the major contributing factor as some problems take years to resolve. The cost of repairing yesterday's work at today's prices has added greatly to the burden. The sheer complexity and size of today's work as compared with a few years ago is another factor."[103]

But an increase in claims frequency or average claim value or even size of premiums paid by the insured is not per se a reflection of an effective civil liability mechanism.[104] Whether the civil liability sanction can have a competence incentive again depends on several other factors.

(1) Victim-Initiative Factors

(i) Client Sophistication. Since 1960 only twelve malpractice actions against architects and engineers have been reported: four directed at engineers, eight against architects.[105] This data by itself is not particularly instructive for reasons that have already been given.[106] What is interesting, however, is that all of the engineering malpractice claims were brought by corporate plaintiffs whereas half of the architecture malpractice claims were instituted by individuals. This is not surprising in view of the findings of Professors Dewees, Makuch

and Waterhouse[107] that a higher proportion of the clients of architects are individuals, than is the case for engineers.

Architects deal mainly with business or government clients (74%), as do engineers (90%).[108] However the individual client constitutes a more significant portion of the architect's practice (24%) than the engineer's (6%).[109] To the extent that an individual may in the overall be less able to clear the recognition and attribution hurdles discussed earlier, the civil liability sanction may be less effective in the architectural context than in engineering. Although the data is less than complete with respect to individual-initiatives, it does suggest a direct correlation between client sophistication and recourse to civil litigation: the "uninformed" client (i.e. one with limited knowledge of the technical and economic aspects of the building industry) never resorted to litigation, whereas in 17% of the cases of dissatisfaction, the "informed" client did resort to litigation to resolve the problem.[110]

In the main it appears that most of the clients using the architect's or the engineer's services are "informed".[111] Nearly all of the clients engaged in comparative shopping before making their final selection form a list of alternatives.[112] And a full 75% of the clients surveyed felt that they were able to discover significant quality differences among the firms they contacted.[113]

(ii) Other Factors. As with accountants, there is no evidence to suggest any reluctance on the part of lawyers to institute malpractice proceedings against either architects or engineers; nor is cost a serious impediment. Here again the typical client-victim appears to be able to deduct the costs of a civil litigation as a business or governmental expense. Unlike accountants however, architects service a sizeable individual-client component. For the individual the traditional costs rules could inhibit otherwise meritorious claims. A contingent fee arrangement would allow the individual-plaintiff to shift some of the risk of failure in the litigation to his lawyer. The literature supporting in principle the efficacy of a contingent fee system is quite comprehensive[114] and does not require further amplification here. It will suffice at this stage to simply emphasize a point made by Professor Prichard: "If one concludes that civil liability is an efficient and important mechanism for maintaining professional competence, then a fee arrangement which facilitates its operation should be encouraged, not attacked."[115] The need for a contingent fee facility is further explored in Parts D and E.

(2) Factors Relating to the Adjudication Process

(i) The Standard of Care. The courts have imposed upon the architect and the engineer the normal professional standard of reasonable competence:

> "[Architects and Engineers] are expected to be possessed of reasonably competent skill in the exercise of their particular calling, but not infallible, nor is perfection expected, and the most that can be required of them is the exercise of reasonable care and prudence in the light of scientific knowledge at the time, of which they should be aware."[116]

The exposure to civil liability for services falling below this standard of care arises out of four sources:

> 1. liability in contract for breach of any express service or quality representation or of the implied obligation "to produce a design reasonably skilful and effective to achieve the owner's purpose."[117]
>
> 2. liability in tort arising out of negligent design or supervision resulting in third party injury.
>
> 3. liability under sections 2.3.1 to 2.4 of the Ontario Building Code imposing certain field review obligations.[118]
>
> 4. liability assumed for any sub-contractors retained by the architect or engineer.[119]

The types of claims that are made against the architect and the engineer are considered later in the discussion of the insurance factor. Briefly, however, they seem to flow from four basic areas of injury: (1) damage to the actual work resulting either from an error in design or an error in supervision; (2) consequential losses arising out of (1) and resulting in delay or non-completion; (3) contingent losses or injuries suffered by a third party as a result of the work designed by the consultant, e.g. sewer operations materially altering the water-table of surrounding properties; (4) bodily injuries suffered by third parties during construction or after completion.[120] Most of

the claims arise out of inadequate supervision and errors in design. Only about 15% of the claims involve personal injury.[121] With respect to architects, the claims relate exclusively to building design and construction (although at least 30% of these relate to non-architectural services for which the architect became responsible in his capacity as prime consultant).[122] Claims against engineers relate mainly to building construction as well; however, 28% of the claims arise out of non-building operations such as waste water systems, utility distribution, bridge construction etc.[123]

How wide a liability have the courts imposed? The fact that a liability insurance crisis is increasingly on the minds of many Canadian architects and engineers suggests that the courts have expanded the consultant's exposure to civil liability. As one commentator has noted:

> "There have been a number of recent decisions indicating a marked trend back, if not to the severity of Hammourabi's Code, to the principle of strict liability. Consider the devastating judgment in Dominion Chain [Dominion Chain v. Eastern Construction et al, (1976) 1 CPC 13] which left the consulting engineer solely liable to an owner for negligence, despite a finding of fault against the contractor primarily responsible for the shoddy work leading to the failure. The same court at virtually the same time found the architect liable in Dabous v. Zuliani (1976), 12 O.R. (2d) 230, for failing to observe and demand rectification of a defect in workmanship, even though the architect had forced the contractor to remedy the identical defect in exactly similar circumstances on the very same job a few days previous."[124]

With respect to architects and engineers at least, the conclusion reached by the professions' national insurer is a fair reflection of the caselaw:

> ". . . our Courts are rapidly moving from the doctrine of reasonable care to the doctrine of strict liability."[125]

(ii) Liability to Third Parties. The requirement of privity of contract has precluded recovery for financial losses resulting from an architect's negligence in several Canadian cases.[126] The American position that an architect/engineer is liable to anyone injured as a result of negligent design or supervision[127] has not yet been expressly adopted in Canada. Two recent Western cases have indicated an expansion in this direction, albeit the analysis employed was hurried and unclear.[128] The national insurance carrier, however, has conceded "the downfall of the doctrine of privity of contract" and is currently advising the profession of the implications of this expanding liability.[129]

(iii) Limitation Periods. The constraints imposed upon the civil liability mechanism as a competence incentive by the statutory limitations period have already been described.[130] It is fair to say that the generally inhibiting features of the Statute of Limitations discussed in the context of accounting[131] would be even more significant in the context of architecture where a negligently designed structure could avoid detection until the limitations period had expired. A recent judicial development, however, has removed much of the constraining effects of the limitations period. In Dominion Chain Co. v. Eastern Con-

struction et al,[132] the Ontario Court of Appeal ruled that a negligence claim against an architect or an engineer could lie in tort as well as in contract. Since a tortious cause of action is not complete until the damage is suffered,[133] there is less likelihood of the six year limitation period barring an otherwise meritorious claim.

Engineers, on the other hand, have always had a wider exposure to liability with respect to the running of a limitation period. Section 28 of the Professional Engineers Act[134] requires that an engineering malpractice action be commenced "within and not later than twelve months after the cause of action arose."[135] The dissatisfaction with this statutory proviso from the engineer's point of view has been explained as follows:

> "Many engineers are dissatisfied with the application of section 28(1) insofar as the limitation period does not start to run until 'after the cause of action arose;' i.e. the limitation period runs from the time of the occurrence of the accident and not from the time of the negligent design of the building. Many engineers feel that this requirement gives rise to an evidentiary problem in litigation that occurs many years after the negligent performance of engineering services. In effect it requires engineers to keep available drawings and other evidence for a potentially long period of time."[136]

The fact that the Court is given a discretion to extend the one-year limitation period if it is satisfied "that to do so is just"[137] has only served to heighten the engineers' concerns for certainty and finality.

The recent decision in Dominion Chain,[138] however, has tempered the discrepancy that has existed to date between architects and engineers with respect to limitation periods. If anything the situation is now the reverse: the limitation factor is more of a constraint in a suit against an engineer than one against an architect.[139]

(3) The Individual Architect or Engineer and the Insurance Factor

(i) Professional Liability Insurance. Neither the Ontario Association of Architects nor the Association of Professional Engineers of Ontario require their members to carry professional liability insurance. Nonetheless both of the governing bodies, together with their respective national associations, have played a major part in arranging for an unique non-compulsory national insurance plan.

When the mid-1960's saw a substantial deterioration of the liability insurance market for architects and engineers, the Royal Architectural Institute of Canada and the Canadian Council of Professional Engineers decided to sponsor jointly their own insurance program. After extensive negotiations, Simcoe and Erie General Insurance of Hamilton agreed to underwrite the national program and Farquhar, Bethune Insurance Ltd. of Ottawa agreed to act as National Program Administrator. The RAIC Professional Liability Insurance Program was established in 1965; the Canadian Engineers Professional Liability Program

was initiated in 1970. Since then about three-quarters of the architects and engineers in practice have taken out liability insurance in one form or another[140] and of these over 80% are insured under the National Program.[141] In all, some 1700 firms are involved at the national level.[142]

The National Program insures the architect and the engineer against any civil liability that "arises out of the performance of professional services for others in the insured's capacity as an architect or an engineer" and "is caused by an error, omission or negligent act".[143] It is a "claims made"[144] policy with an express itemization of the claims that are excluded, e.g. business risks, unreasonably assumed risks, express warranties, certain specialized risks, libel and slander, etc.[145] The insurance package available for the architect or engineer in private practice consists of a $100,000 basic coverage with a $5,000 minimum deductible. Limits of up to $5 million are readily available. Anything in excess of $5 million requires a special re-insurance arrangement. For individuals that are not in private practice, the National Program provides two basic packages: Coverage A consists of a $50,000/$1,000 deductible basic, and Coverage B consists of a $100,000/$2,000 deductible basic. Higher limits are available here as well. The data from the National Program Administrator suggests that most of the firms with an annual fee income of less than $1 million prefer a $250,000 coverage level; firms whose income exceeds $1 million carry insurance at a level of $500,000 and more.[146] Unfortunately,

there is no breakdown of the number of firms at each of the levels of coverage.

(ii) Premiums and Rating. According to the Professional Handbook recently published by the National Program Administrator:

> "The rating is based strictly on Canadian experience. A requirement for coverage is membership in good standing in the CCPE or RAIC. Each applicant is reviewed individually and is assessed a premium commensurate with the firm's exposure and experience. In all cases acceptance will be on individual merit. . . ."[147]

More specifically, premiums are rated on the basis of four factors: (1) type of practice (commercial, recreational, residential, etc.); (2) size of practice; (3) geographical location in Canada; (4) loss experience. Although Farquhar, Bethune Insurance emphasizes "individual merit", this does not mean risk-rating an individual architect or engineer. The concern here is that individual risk-rating would result in an overall inhibition of claims reporting. The National Program Administrator is anxious to encourage the timely reporting of all possible claims:

> "All consultants, therefore, are encouraged to report problem situations at the earliest opportunity. No penalty is assessed for the number of claims or problem situations reported. Furthermore the defence cost is not subject to the deductible, to encourage the insured to call in the assistance of the program's legal counsel, rather than trying to muddle through with their own friendly lawyer, who may or may not be conversant with construction litigation and insurance philosophy, and then notifying the insurer when its position may be materially prejudiced."[148]

The size of the average premium has grown substantially in the last seven years but increases have not been as dramatic as in the U.S. The following table[149] provides the relevant comparisons both with American architects and Canadian inflation:

History of Insurance Rates 1970 to 1976

Year	Bldg. Costs in Canada	RAIC Aug. Rate Changes	USA Architects Rate Changes
1970	100	100	100
1971	109 (9%)	110 (10%)	133 (33%)
1972	120.6 (10.7%)	129.3 (17%)	178.2 (34%)
1973	133.8 (11.01%)	134.2 (4%)	213.8 (20%)
1974	148.9 (11.3%)	152.1 (13%)	265.2 (24%)
1975	176.3 (18.4%)	178.4 (17%)	461.3 (76%)
1976	(Projected . . .)	278.1	

(iii) Claims History. For both architects and engineers, the years 1972 to 1975 were particularly severe in terms of claims frequency and value.[150] Fortunately, the deterioration has slowed considerably and in some respects, improvements are noticeable. The claims data can be better understood by dealing with architects and engineers separately.

For architects the projects that have yielded loss figures in excess of premiums paid are (1) institutional projects; (2) high-rise apartments; and (3) recreational projects. In the case of institutional projects the incurred losses exceeded premiums paid by 18%.[151] The single most significant reason for claim is design error which has an incidence of 29.4% and a dollar value of nearly 50%. The second major source is

inadequate supervision--19.7% incidence and 22.9% dollar value. Defective workmanship accounts for only 5.7% of the claims and 3.0% of the dollar value.[152] Although the claims frequency has increased dramatically, jumping from one claim per 21 policies in 1966 to one claim per three policies in 1977, the cost of the average claim has decreased.[153] The National Program's permissible incurred claim figure is $7,139; the actual cost of the average claim in 1977 was $4,000.[154]

For engineers, the three disciplines of structural engineering, soil mechanics and architectural engineering have had the worst claims experience. The loss experience in structural engineering has been particularly bleak.[155] This is the only discipline where more than 75% of the claims involve errors in design. In the case of all the other disciplines, the great majority of the claims are the result of allegations of negligent field services (described by the claimant as negligent or inadequate supervision.)[156] Some 40% of the claims in the area of structural engineering are the result of either partial or total roof collapses.[157] Only the civil, electrical and mechanical engineering disciplines have managed to preserve a healthy losses-to-premiums balance. Still, notwithstanding the dramatic increase in claims frequency from 1970 to 1977, the cost of the average engineering malpractice claim has actually decreased. Today the National Program Administrator's permissible incurred claim figure is $15,167; the average claim in 1977 was for $7,844.[158]

(4) Factors Affecting the Response of the Professions as a Whole

(i) Compulsory Insurance. The National Insurance Program is, of course, non-compulsory. The question of a compulsory liability insurance scheme was raised at the Annual Meeting of the OAA in 1973. A task force was appointed to consider the matter and to report back to the OAA at their next annual meeting "on the feasibility of installing compulsory professional liability insurance for all practising architectural firms in the province of Ontario."[159] The Task Force recommended the following:

> "It is in the best interests of the architectural profession to require mandatory errors and omissions insurance as a condition to practice."[160]

The minutes of the 1974 Annual Meeting suggest that there was a widespread feeling among the architects present that "there could be dangerous repercussions in making professional liability insurance mandatory since it would mean giving the right to determine who should practise architecture in Ontario to the agencies and companies would would be issuing professional liability insurance policies."[161] The minutes then conclude as follows:

> "After taking a straw vote the Chairman summed up by saying it appeared that mandatory professional liability insurance was not necessarily favoured by the meeting but that the problem of professional liability insurance certainly deserved continued and competent attention on the part of the profession."[162]

(ii) A Self Insurance Component. The National Insurance Program administered by Farquhar, Bethune Ltd. has no self-insurance component.

(iii) The Relationship with the Insurer. Both the RAIC and the CCPE, and through them the OAA and APEO, have an excellent relationship with the National Program Administrator. Both professions work through their Joint Insurance Committee that meets regularly with both the N.P.A. and the underwriter. This close relationship with the insurer was anticipated from the very inception of the national program. The informational brochures that were distributed to all Canadian architects and engineers by the N.P.A. emphasized the comprehensive nature of the insurance program and listed ten specific "features":

1. Centralized co-ordination and control through the National Program Administrator.
2. A comprehensive loss control program.
3. A network of expert legal counsel across Canada.
4. Holding of seminars in major centres throughout the country.
5. Publishing of informative bulletins alerting Professional Engineers to pitfalls and dangers that have been experienced by others, with suggested hints for avoidance in the future.
6. Advice and discussion on all matters concerning the involvement of the professional's legal responsibilities to clients, and the public.
7. Close co-operation and communication between the Joint Insurance Committee composed of members from ACEC and CCPE, the National Program Administrator and the Insurance Company.

8. Annual reports to the Joint Insurance Committee on statistical results of the program.

9. Special reports to the Joint Insurance Committee on particular underwriting and claim situations with a view to seeking solutions which are acceptable and/or beneficial to all concerned.

10. Establishment of future rate levels consistent with the pure experience of the group as a whole, but at the same time giving full consideration to the individual merits and hazards of each firm enrolled, considering type of work, experience, size, past record and location of operations.

It appears that all of the promised advantages have materialized. There has indeed been "close co-operation and communication" between the Joint Insurance Committee and the N.P.A. Annual and special reports collecting and interpreting the claims data flow from the insurer to the profession's governing body. Extensive loss control and professional development seminars are continually being arranged by the National Program Administrator. Attendance is encouraged by the insurer's offer of lowered premiums for those who participate. The incentive appears to be working:

> "The most effective series of Loss Control Seminars to date were held in October and November, 1975 across the country with a total attendance in excess of 2000 architects and engineers, an increase of almost 200% over the previous years. The incentive for attendance has proven most useful and it is hoped to be able to continue this in the future."[163]

The most impressive feature of the National Program continues to be the Loss Control Program. Its main purpose has been described as being "the establishment of a continuing dialogue between the insurers and consultants, to alert architects and engineers of the dangers and pitfalls experienced by others."[164] One of the most important aspects of the loss control program has been the regular dissemination of "loss control bulletins".[165] To date, some 38 such bulletins have been distributed. The bulletins provide information on a wide variety of matters relating to professional competence: the nature and extent of the insurance policy; recent caselaw developments; construction tips; claims data; suggested standard form clauses etc.

The extent of the professions' relationship with its insurer is well illustrated by their respective responses to a loss prevention problem involving roofing claims. In 1975 a detailed computer analysis of the claims data had produced an alarming statistic: 23% of all the claims being reported involved roof problems (11.4% roof leaks and 11.5% structural problems). These claims represented 34% of the insurer's total outlay. Encouraged by the National Program Administrator, the RAIC and CCPE set up a technical sub-committee on roofing to study the problem with a view to reducing the incidence of roofing claims.[166] The N.P.A. co-operated by issuing a special bulletin entitled "Roofs--Some Basic Design Criteria".[167] Other suggestions that materialized from the meetings of the roofing sub-committee included (1) the establishment of a list of experts for the

review of roof design and supervision, and (2) the issuance of a handbook on roofing construction.[168]

(iv) Competence and Discipline. The extent to which the disciplinary bodies of the OAA and the APEO concern themselves with problems of professional incompetence is considered at length by Professor Reiter.[169] A brief overview of the relevant legislation however, suggests that both the OAA and the APEO can use their disciplinary mechanisms to deal with problems of incompetence.[170]

3. The Legal Profession

The effectiveness of the civil liability mechanism as a competence incentive in the practice of law has only recently become a matter of concern to Ontario lawyers. In part, at least, this concern is a reflection of the well-publicized developments south of the border:

> "Legal malpractice suits, virtually unheard of only a decade ago, have proliferated steadily, along with considerable publicity. No less a figure than Chief Justice Burger has suggested that perhaps 50% of U.S. trial lawyers are incompetent; that comment created quite a

> stir, but there was scarcely a peep a few years earlier when Chesterfield Smith, a former president of the American Bar Association, said that he would not trust 20% to 25% of all lawyers."[171]

In the U.S., of course, the American lawyer has felt the impact of the growing crisis in professional malpractice--insurance premiums for lawyers in some states have jumped 400%.[172] By comparison the experience of the Ontario lawyer has been uneventful. There have been increases to be sure.[173] But, on balance, the Law Society of Upper Canada has managed to achieve some degree of stability. Indeed in 1977, the Claims Manager of the Law Society's Errors and Omissions Insurance Program offered the following prognosis:

> ". . . the road this Law Society is now travelling is the right road; the going is fair to good and as far as my eye at least can see, there is no reason to assume that next year, and the year after that, won't be as satisfactory."[174]

The question for our purposes, however, is not whether the lawyer's exposure to civil liability has been satisfactorily minimized through a group insurance scheme, but whether the civil liability mechanism continues to have any impact as a competence incentive. Our answer to this question will again require a careful analysis of the factors that determine effectiveness.

(1) Victim-Initiative Factors

(i) Client Sophistication. Of the 25 legal malpractice cases reported since 1962, over 80% were brought by individual plaintiffs. The only instructive aspect of this datum

is in its emphasis of the fact that in comparison with the other three professions a larger proportion of the lawyer's clients are individuals. The POC survey of Ontario law firms reinforces this point: individuals make up from 37% to 75% of all clients receiving legal services.[175] This factor is significant. To the extent that an individual is less informed than most business clients, the potential for injury recognition and attribution is decreased. The POC Client Survey made the following findings: (1) most individuals use a lawyer fairly infrequently;[176] (2) when selecting a lawyer, only 15.7% of the sample "shopped around"; most had only one lawyer in mind and called that lawyer;[177] (3) the average individual client had very little information about a lawyer's practice;[178] (4) most of the clients did not discuss the fee prior to selecting a lawyer; indeed, 47% never discussed fees; and, of the 42% that did ask about legal fees, over 10% did so after the final bill was presented;[179] (5) over 36% of the sample did not know what they could do about unsatisfactory legal services; over 8% felt that nothing could be done.[180] In sum, the individual was seen as an "unsophisticated one-shot user of lawyer's services unable to perceive and evaluate quality variations."[181]

The business client, on the other hand, was somewhat more sophisticated. The POC Client Survey yielded these findings: (1) 73% of the business clients did "shop around" before selecting a law firm;[182] most did discuss the question of legal fees before a final selection of law firm;[183] (3) although the extent of

dissatisfaction with his lawyer's services was minimal, the business client was better able to evaluate the quality of the legal services received;[184] (4) and was better informed with respect to the courses of action available to him when the legal services proved less than satisfactory.[185]

(ii) Other Factors. How difficult is it to find a lawyer willing to institute a legal malpractice action against one of his colleagues? The evidence thus far suggests that legal malpractice lawyers are not a scarce commodity. Indeed, if anything, the opposite may be true. As one commentator has suggested:

> "If lawyers have deserved any criticism in this regard, it is perhaps that some of them are said to have been very quick to attack fellow members of their own profession."[186]

The other factor that deserves mention is costs. The point has already been made that in principle a contingent fee structure would encourage meritorious malpractice claims.[187] This point deserves particular emphasis in the present context where a significant proportion of the malpractice victims will be risk-averse individuals. We return to this question in Part E of this paper.

(2) Factors Relating to the Adjudication Process

(i) The Standard of Care and Scope of Scrutiny. The courts have held the lawyer to the same general standard of care expected of all professionals. In Banks v. Reid,[188] Henry J. particularized this standard as follows:

> ". . . a solicitor holds himself out to his client as possessing adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes. He is not, however, required to act as if he were infallible, nor can he be held liable because his honestly formed opinion on a question of law proves to be wrong. He is, however, bound to exercise care in the performance of his duties . . . the standard of care to be applied is that of the reasonably competent solicitor."[189]

Two important points emerge from this liability rule: first, a lawyer may be civilly liable for most of the professional errors committed by him in the performance of his duties, e.g. missed limitation periods, negligent title searches, improperly drafted documents etc.; but, unlike other professionals, the lawyer will not be exposed to liability for a mere error in judgment involving a point of law. Why this limited scope of scrutiny? Why should the lawyer be granted such a wide immunity? The rationale for this preferential treatment of the legal professional is fairly obvious:

> "There is simply nothing very scientific about the law. It is not governed by the inexorable rules of nature. Although there is some degree of symmetry to the law, and broad trends can frequently be detected, it is an extremely risky business to prognosticate what a particular jurisdiction is likely to do next on a particular narrow issue. . . .
>
> Probably the only real philosophical justification for protecting the lawyer from malpractice in such situations is plainly and simply the extremely difficult, and next to impossible problem which the lawyer faces in attempting to anticipate unpredictable courts and legislatures.
>
> . . .

> [I]f attorneys were subject to a suit for malpractice for every alleged error of professional judgment that could be demonstrated by hindsight, or by the opinion of another client's lawyer, we would have an intolerable situation of one or more potential attorneys' malpractice cases arising from just about every trial in all our courts, the role of the lawyer as advocate would tend to be discouraged, and the continuing dynamic development of law and society would be dampened."[190]

There is one further immunity that is not as easily explainable. In 1969 the House of Lords suggested that a barrister could not be held civilly liable for the negligent conduct of a trial.[191] Their Lordships took the position that reasons of public policy required that the barrister be accorded this immunity, that is, to prevent the undue proliferation of trials and retrials that could result if counsel's negligent conduct of a case was actionable. This decision in Rondel v. Worsley[192] received international criticism.[193] And, until 1974, most Ontario lawyers could properly have taken the view that the immunity accorded the English barrister was quite irrelevant to the practice of law in a jurisdiction where the profession was fused. Indeed Laskin J.A. (as he then was) commented in 1969 that the rule in Rondel v. Worsley was based "on considerations which have no Canadian relevance."[194] In 1974, however, a judge of the High Court of Ontario suggested that, despite the fusion of the profession in this province, the same public policy reasons that compelled the rule in Rondel v. Worsley[195] are applicable to Ontario as well.[196] The learned judge indicated, however, that the specific issue had not been argued before him. Thus it remains to be seen whether the English barrister's

immunity will be accorded the Ontario lawyer. The basic principle involved in this debate, however, should not be overlooked. As a leading Ontario counsel put it:

> "Can somebody explain to me why there is any difference between my mucking up a case on my feet in court and a doctor doing the same thing on his feet in an operating room?"[197]

Apart from the narrower scope of scrutiny described above, it is fair to say that the courts have been concerned that the lawyer be held to as high a standard of care as any other professional. No Canadian court, however, has made any move to expand the traditional bounds of the legal malpractice action. Two recent developments in the U.S. may provide the necessary motivation. In Smith v. Lewis[198] a California court has expanded the traditional standard of care to include knowledge of those principles of law which a well-informed attorney should have been able to discover through the use of standard library research techniques. Thus, a fundamental working knowledge of the law will no longer be sufficient to protect the California attorney from malpractice liability. In Dilliplaine v. Lehigh Trust Co.[199] a Pennsylvania court implied that a trial attorney may be liable for his negligent failure to object at trial when an objection is necessary to preserve the record for appeal. The implications of these decisions are significant: compliance with the traditional standards of care in both legal research and litigation will no longer shield the American lawyer from malpractice liability. Should Canadian courts move in this direction, the effectiveness

of the civil liability sanction as a competence incentive will be undeniably enhanced.

(ii) Liability to Third Parties. Most professional negligence actions against lawyers will arise directly from the lawyer-client relationship. There may well be cases where losses arising out of a badly drafted will or a poor title search will be suffered by a third party. Some U.S. jurisdictions have rejected the stringent privity test and have allowed third party recovery where the plaintiff could show that he was a party that was intended to be benefitted by the lawyer's work.[200] Other American jurisdictions have proceeded more cautiously.[201] In Ontario, a third party claim against a lawyer has been allowed but the Court stressed the fact that the lawyer was aware of the reliance being placed by this third party upon the legal documents being drafted by him.[202] It is doubtful whether the expansionary dicta in Haig v. Bamford[203] which exposed Canadian C.A.'s to increased third party liability will be found generally applicable to the practice of law.

(iii) Limitation Periods. As is the case with most professional malpractice actions, a legal malpractice action instituted by the injured client is said to lie in contract not in tort.[204] The institution of the legal malpractice action is governed by the general limitation period already discussed[205] and the comments made earlier in the context of the other professions are relevant here as well. The only hope for a litigant

who discovers a malpractice-related loss after the six-year limitation period has expired is the recent judgment in Dominion Chain.[206] The implications of this decision have already been discussed.[207]

(3) The Individual Lawyer and the Insurance Factor

(i) Professional Liability Insurance. A universal and compulsory errors and omissions insurance program was introduced by the Law Society of Upper Canada in 1971 through an arrangement with the Guardian Insurance Company of Canada. For a variety of reasons this plan broke down after only one year, in part because neither the Law Society nor the insurer had anticipated that so many claims--nearly 400--would be filed. Beginning in 1972, the insurance program was underwritten by Lloyds of London. This arrangement lasted for five years. Faced with a continued escalation of premiums, the Law Society's insurance committee concluded that the most effective means of dealing with the overall problem of errors and omissions was to adopt a partial self-insurance scheme. This new scheme went into effect in 1977.

Today the Law Society's compulsory, partially self-insured errors and omissions insurance plan has the following important features. Every Ontario lawyer in private practice carries the basic $100,000 insurance package. (Coverage in excess of this minimum amount is readily available). There

is a $5,000 deductible. The Law Society itself has self-insured to a level of $35,000. The excess,that is from $35,000 to $100,000, is picked up by the underwriter. The underwriter of the Law Society's insurance package is Gestas Corp., a Montreal-based insurance consortium. The broker is Marsh and McLennan Ltd. and the adjuster is F.C. Maltman and Co.[208]

(ii) Premiums and Rating. The question of individual risk-rating and variable premiums was considered by the Law Society's Errors and Omissions Committee when the insurance plan was first instituted. The Committee concluded that a variable premium structure might seriously inhibit the early reporting of claims and on balance prove to be procedurally unmanageable.[209] The premiums paid today reflect an equally distributed responsibility for the incidents of professional malpractice. Every Ontario lawyer in private practice is required to pay an annual premium of $375. It is anticipated that the premium will not be increased for at least another year.[210] A similar premium structure exists in the other common law jurisdictions in Canada, although the individual levies imposed upon a lawyer practising in Saskatchewan or in Newfoundland are understandably lower.[211]

(iii) Claims History. The report of the Claims Manager to the chairmen of the Law Society's Standing Committees was particularly instructive.[212] As of October 31, 1977, some 410 legal malpractice claims have been processed. Of these, 330 are still open. The smallest claim was $750; the largest was

approximately $3 million. The average claim size was $6,697.[213] The precise liability breakdown was as follows:

Liability Burdens[214]

1.	Cost to the Individual Insured:	$1,042,500.
2.	Cost to the Law Society:	$1,401,104.
3.	Cost to Gestas:	$ 302,336.
	Total Claims Paid or Reserved:	$2,745,940.

A breakdown of the claims made to October 31, 1977 in terms of their origin would yield the following data:

Loss by Origin[215]

1.	Real Estate	48%
	(Defective Title Searches 22%)	
	(Registration Errors 19%)	
	(Other 7%)	
2.	Missed Limitation Period	15%
3.	Commercial Errors	12%
4.	Other Assorted and Miscellaneous	25%
		100%

In the U.S., missed limitation periods account for 43% of the claims, document preparation for 21% and real estate errors for only 20%.[216]

The Law Society's errors and omissions insurance program is seen by many to be working satisfactorily. About 98% of the claims made fall within the bounds of the $35,000 combined deductible.[217] According to the Law Society's Claims Manager, "The going is fair to good, and . . . there is no reason to assume that next year and the year after that won't be as satisfactory."[218]

(4) Factors Affecting the Response of the Legal Profession as a Whole

(i) Compulsory Insurance. The compulsory nature of the insurance program has already been described. The legal profession is the only one of the four professions under study that has instituted a mandatory errors and omissions insurance plan.

(ii) A Self-Insurance Component. The legal profession is also alone in its adoption of a significant self-insurance component. As noted earlier, the Law Society carries a $30,000 deductible, the largest professional self-insurance scheme in Canada today.[219] The justification for such a substantial self-insurance component is largely one of financial incentive. As the Chairman of the Errors and Omissions Committee explained:

> "We are responsible for the cost of administering our own coverage and realize directly that the cost of our mistakes is paid from our own pockets and this brings home to the membership the urgent need for effective loss control techniques."[220]

The Law Society's own fund is itself insured against depletion by a "stop-loss policy" which comes into play when $2 million has been paid out of the fund. The Chairman of the Law Society's Errors and Omissions Committee has recently reported that payments out of the Law Society's pool will fall short of the $2 million limit by $125,000.[221]

(iii) The Relationship with the Insurer. Because most of the claims made fall within the combined $35,000 deductible, there is less need for an extensive relationship with the insurer. A "claims committee" composed of representatives from Gestas and from the Law Society has met regularly to review the claims data. According to the Claims Manager, the co-operation of Gestas has been "first class".[222]

With respect to loss control, the loss prevention program instituted by the Law Society is clearly not as comprehensive as that of the architects or engineers. Still, a substantial program in continuing legal education has been implemented.[223] And, more importantly, the Law Society has distributed a "loss prevention manual" prepared by the adjuster, F.C. Maltman and Co.[224] The purpose of the manual was "to reduce the number of claims by pointing out those pitfalls which experience has shown are the areas of greatest danger for practising lawyers."[225] The manual covers a wide range of topics: professional negligence, the nature and extent of the lawyer's liability insurance policy, a brief synopsis of the sources of claims, an itemization of all relevant limitation periods, a series of detailed "checklists" to ensure procedural competence.[226] The manual has been well-received. The Chairman of the Errors and Omissions Committee has advised the Bar that his copy "is going to stay right by [his] desk as a reminder that we can all slip but it's less likely if we watch our step."[227]

(iv) Competence and Discipline. In 1973, the Ontario Law Reform Commission's Report on the Administration of Ontario Courts[228] noted the following:

> "We should point out, . . . that the Law Society of Upper Canada has jurisdiction to discipline a solicitor in cases where he has been found guilty of 'professional misconduct or of conduct unbecoming a barrister and a solicitor'. We can think of no reason why solicitors who are incompetent in proceedings before the courts and who demonstrably retard or interfere with the administration of justice when practising in the courts should not be subject to professional disciplinary proceedings."[229]

Until 1977 the Law Society had little if any access to the insurer's claims data and thus could not identify the lawyers with competence problems. Indeed the Law Society was advised that such access would be a breach of the confidential relationship that arose out of its role as insurance agent.[230] In 1977, however, this agency relationship disappeared when the Law Society became a partial self-insurer. As a self-insurer, the Law Society can now scrutinize its claims data in order to spot the lawyers that are having competence problems. And, where disciplinary action would be premature, a process of "informal consultation" is employed to assist those who are in difficulty.[231] In this regard, the Law Society's Errors and Omissions Committee has agreed to assume a higher profile:

> "The Errors and Omissions Committee intends to give direct counsel and assistance to members who, from their record of claims appear to need it. They will invite members to attend a meeting of the Committee to discuss the cause of their mistakes and attempt to suggest practical measures to preventing them in the future. Instances of gross negligence or repeated losses in similar circumstances will come before the Discipline Committee and may result in charges of professional misconduct."[232]

The extent to which the Law Society's disciplinary body has in fact responded to competence matters is examined more closely by Barry Reiter.

****

D. AN EVALUATION

This paper has proceeded on the theoretical assumption that civil liability can provide some incentive for continuing professional competence. The real concern was whether the various constraints existing in the actual practice of accounting, architecture, engineering and law served to minimize or eliminate much of this theoretical incentive. Those factors that could impede an otherwise effective civil liability vehicle have been surveyed; thus it should now be possible to provide a final evaluation.

There is, however, one threshold matter that deserves some emphasis. In this paper, any extensive analysis has not been attempted of the one factor that may well have the greatest influence on the effectiveness of the civil liability mechanism as a workable competence incentive: competitive market pressure. The impact of this variable cannot be overstated.

> ". . . the single most important factor influencing the effectiveness of the civil liability mechanisms for a given profession is the extent to which the practice of the profession is subject to competitive market pressures. In professions which are constrained by competitive market forces, the civil liability mechanism should be relatively more effective. Conversely, where market forces are weakened or essentially non-existent, considerable inefficiencies of the mechanism can be predicted."[233]

In the absence of competitive market constraints, the professional's adoption of sub-optimal methods of practice (e.g. procedural delay and "defensive medicine") will go unchecked.

The financial discipline of the market that would otherwise force an internalization of the costs of these inefficiencies, and thus encourage self-correction, is absent.[234] And the civil liability mechanism simply cannot reach non-actionable incompetence. As the Ontario Law Reform Commission noted in the context of the legal profession:

> ". . . most incompetence does not manifest itself as actionable negligence but rather in unduly-delayed lawsuits. For this the individual litigant probably has no effective remedy (unless he changes his lawyer relatively early in the case) and certainly the litigating public suffering from protracted trials has no remedy . . .".[235]

Nor can the civil liability mechanism deal effectively with the "defensive medicine" phenomenon. The judicial sensitivity to "custom" as a relevant index of professional competence will perpetuate the ineffectiveness of the civil liability mechanism. Professor Prichard explains:

> "There are two major reasons why the defensive medicine problem arises: the absence of a competitive market in the delivery of medical services and, consequently, the use of custom as the standard of competence in professional negligence actions. The absence of market forces allows the physician to adopt the defensive practices without financial penalty or consumer disapproval and the customary practice standard incorporates the sub-optimal practices and indeed, over time, may require them."[236]

In sum, the effectiveness of civil liability as a competence incentive will be seriously curtailed where the professional services market is less than competitive. The extent of

competition in a particular market will be influenced by several factors: the relative substitutability of one profession's services with that of another, (e.g. the design services of the architect and the engineer); the degree of complexity of the services rendered and the consumer's ability to make price/quality comparisons; the source of payment for the services--state insurance or private fee; the extent to which the profession permits informational advertising.[237] None of these variables were extensively explored in this paper. Whether or not there exists an appropriate degree of competition in the delivery of a particular profession's services is a matter that cannot be considered in the context of civil liability alone.

> "The decision as to the degree of competition that is appropriate for the regulation of a particular profession will be based primarily on factors other than the impact of competition on civil liability and continuing competence. However once the decision is taken, it becomes the dominant variable in determining the relative effectiveness of civil liability."[238]

The Professional Organizations Committee is left with the consideration of the nature and extent of competition in the practice of accounting, architecture, engineering and law. The necessary caveats with respect to the overall effectiveness of the civil liability mechanism as a competence incentive have been articulated. Of course it is still possible to evaluate the effectiveness of the civil liability mechanism as a vehicle for the regulation and control of <u>actionable</u> incompetence. This task is turned to, now.

1. Accountants. In the canvass of the various determinants that are at play with respect to Ontario chartered accountants, several conclusions were suggested. First, victim-initiative is not a significant concern. The clients' ability to recognize and attribute incompetence-related losses is unsurpassed. Secondly, the adjudication process is unencumbered by the more usual instances of judicial inflexibility. A major expansion of the C.A.'s liability has been seen. Indeed, the ICAO's current worry is that the expansion of liability may be coupled with class action reforms with the result that "the accounting profession may well be unable to bear the burden of increased exposure."[239] There are, however, several substantial factors that detract from the potential effectiveness of the civil liability mechanism: the absence of compulsory insurance, the absence of a significant deductible, a non-experience rating scheme, and a less than effective professional relationship with the private insurers. Taken together these factors can only impede the development of a systematic approach to malpractice claims. No comprehensive loss control program has been instituted. No attempt has yet been made to regularize the response of the disciplinary body to individual competence problems. In sum, civil liability seems to be effective but only as a compensation mechanism.

2. Architects and Engineers. Here again, the constraints that could potentially affect the adjudicative process are

uniformly insignificant. The judicially-imposed liability rules are sufficiently expansive. Indeed the current president of the OAA has suggested that the courts have gone too far--that an "unfair burden of liability" has been imposed and that "too much is expected of architects."[240] The fact is, however, that not all victims resort to litigation. The extent to which some of the profession's clients are "uninformed"[241] and thus unable to clear the recognition and attribution hurdles is a matter of some significance. The insurance-related factors prove more positive. Although the professions have not opted for compulsory insurance, the RAIC- and CCPE-sponsored National Program is quite impressive. The premiums are risk-rated. There are minimum deductibles. And the relationship both professions have with the National Program Administrator is excellent. The claims data is systematically reviewed; there is close co-operation and communication between the Joint Insurance Committee and the NPA; a comprehensive loss control program has now been operational for several years. Has the civil liability mechanism influenced professional competence? According to the National Program Administrator it has.[242] The CCPE agrees. In its view, the absence of an American-style liability crisis "is due entirely to the benefits of the [national] program which introduced for the first time anywhere in the world, consolidation of premium, introduction of loss control through seminars and bulletins and expert claims handling."[243]

3. Lawyers. In the case of the legal profession, the effectiveness of the civil liability mechanism is significantly enhanced by the profession's insurance arrangement. The Law Society has instituted an universal and compulsory group insurance plan with a substantial self-insurance component. This means that the claims data can be easily collected and interpreted for the implementation of appropriate loss prevention measures. Individual competence problems are being identified and dealt with, either informally through the Errors and Omissions Committee or more formally through the disciplinary mechanism. The individual lawyer finds an additional incentive in the $5000 minimum deductible. In sum, the insurance factor is not a significant constraint. The major constraints are elsewhere. First, they operate in the context of victim-initiative. The vast majority of the legal profession's individual-clients will rarely claim malpractice or resort to litigation to recover damages from a negligent lawyer. The reasons have already been canvassed: information barriers; costs barriers. The second major area of constraints exists in the adjudication process. Although the general standard of care is not unlike that expected of other professionals, it is fair to say that:

> "The lawyer who commits a malpractice in the representation of his clients . . . is protected by a maze of ancient legal privileges which make it virtually impossible for the injured client to be made whole." 244

The procedural roadblocks are many--privity, the "suit within a suit" hurdle,[245] the barrister's immunity from in-court negligence, etc. In sum, notwithstanding the positive pressures of the insurance arrangement, the civil liability mechanism in the context of the legal profession is not a major competence incentive.

4. Conclusion. Not surprisingly, the relative effectiveness of the civil liability mechanism as a competence incentive varies from profession to profession. With architects and engineers, the civil liability mechanism appears to be relatively effective. In the accounting and legal professions, the mechanism is less effective. Nonetheless every profession has felt to some extent the impact of professional liability and, again to some extent, has attempted to respond through various insurance and loss prevention programs. Can the civil liability mechanism perform a useful function as a competence incentive? Professor Prichard's perspective is supported:

> ". . . in the apparent absence of a superior alternative mechanism, civil liability, with its advantage of flexibility, dynamism, indirectness and individuality, is a relatively attractive and effective tool for achieving minimum levels of continuing competence. An enlightened policy should, in most cases, include civil liability as one element in the calculus of institutional arrangements in the search for competence."[246]

That is not to say, however, that the civil liability mechanism as it currently operates in the practice of accounting, architecture, engineering and law is working satisfactorily. It is submitted that extensive reforms are necessary before civil liability can in fact claim the theoretical advantages suggested by Professor Prichard. The necessary reforms are itemized in Part E.

****

E. RECOMMENDATIONS

(i) Improving Victim-Initiative

1. Increased Information. It is imperative that more information be provided to individual clients of professional services. Even the most sophisticated clients have indicated a need for more information about the professional services being supplied--the fees charged, the type and quality of the work promised, the available redress or complaint mechanisms etc.[247] The legal profession deserves the most criticism in this respect. What is desperately needed is an increased public awareness of professional services. Informational advertising would be an important component of a "client education" program. The question of advertising is, of course, closely related to the more fundamental issue of competition. Caveats have already been registered on this point. It is nonetheless recommended that the POC continue to research the question of the appropriate degree of competition in each of the four professions with a view to encouraging a more active information market.

2. Standard Setting by the Profession Itself. The existing information deficiencies could be significantly improved if each profession undertook to set requisite performance standards. The setting of standards

would require a careful analysis of the more prevalent pitfalls in the delivery of the profession's services and a meaningful description of the expected standards of care and skill. The task itself would be formidable but the benefits would be substantial, both for the client and the profession itself:

> "Once established, these standards will both aid outsiders in taking effective action in dealing with incompetence as it concerns their interests, and will simultaneously restrain the range of discretion outsiders have in dealing with matters that directly affect the profession."[248]

It is recognized that some professional tasks will not lend themselves to an exercise of standard-setting. However, <u>to the extent that it is possible</u>, it is recommended that the four professions under study be encouraged to develop and publicize performance standards. Of course, any standard-setting exercise that is attempted by the profession's governing body will require complete access to claims data. The need for mandatory data disclosure is discussed below.

3. Lawyer Lists. Victim initiative could also be improved if injured clients were reassured that legal counsel was available for the institution of malpractice proceedings. Although the evidence to date does not indicate any serious problem in this regard, the POC may choose to adopt the suggestion in the United Kingdom's Lay Observer's Report[249] that lists of lawyers who have the skill and experience for professional negligence litigation be compiled and available to the public on demand.

4. Contingent Fees. It is recommended that the POC urge the province seriously to consider permitting contingent fee arrangements. The arguments favouring this reform of the costs rules are compelling.[250] And, if one concludes that civil liability is indeed an important mechanism for maintaining professional competence, "then a fee arrangement which facilitates its operation should be encouraged, not attacked."[251] There is of course much controversy in the literature with respect to contingent fee proposals. Perhaps a limited and controlled experimentation period would be an appropriate compromise as well as an effective test vehicle.

(ii) Facilitating the Adjudication Process

5. Limitation Periods. The Attorney-General of Ontario is quite correct when he describes the present limitations statute as "obscure . . . archaic, and out of harmony with modern conditions."[252] It is particularly important that professional

malpractice actions not be otherwise impeded by an ambiguous and often-times unfair limitations period. It should be made plain statutorily that the limitation period does not begin to run until the injury has occurred. The POC should support the Proposed Limitations Act.[253]

6. Other Procedural Reforms. One example of a procedural barrier that deserves further analysis is the requirement that a plaintiff who alleges legal malpractice on the basis of a missed limitations period demonstrate that his original action would have succeeded if the attorney had not been negligent. This "trial within a trial" procedure has been criticized as a "self-serving and primitive"[254] requirement. One writer has argued that the burden should be shifted to the defendant lawyer in such cases to demonstrate that the client's cause of action lacked merit.[255] It is recommended that further research be conducted into these and other procedural impediments.

7. Publicize Court Awards. In addition to the financial incentive provided by a damages award, there is a non-financial incentive--the moral stigma that attaches to a judicial finding of professional negligence. This incentive should be strengthened

by requiring widespread publication of the malpractice action and its outcome.

8. Peer-Review Mechanisms. This paper has said very little about alternatives to the existing court-oriented adjudication process. Several American jurisdictions have been experimenting with non-curial mechanisms for the resolution of professional negligence claims. Arguments have been made that Professional Standards Review Organizations (PSRO's) utilizing peer and lay person adjudicators are more efficient and in the overall more effective with respect to continuing competence.[256] Others have criticized these panels as being too costly, toothless, bureaucratically unmanageable and inherently unfair.[257] The entire question of institutional design of the imposition of civil liability is a matter that will require further discussion once the overall effectiveness of the civil liability mechanism has been determined. To date no empirical data have been collected with respect to the general effectiveness of the non-curial review panels.[258] The POC may wish to encourage further research in this area.

(iii) Dealing with the Insurance Factor

9. Compulsory Insurance. It is recommended that the ICAO, the OAA and the APEO require their members to carry professional liability insurance as a condition of professional practice. The Law Society has already

done so and the benefits are evident. First, compulsory insurance means a greater opportunity for the compensation of all losses caused by a professional's negligence. Secondly, and more importantly for the purposes of this paper, mandatory insurance would yield a more complete data base thereby allowing greater accuracy in the design of continuing education and loss prevention programs. The concern of the OAA that compulsory insurance would give the insurer too much control over who could or would not practice architecture is unfounded. With many insurers serving the profession, the concentrated power base would not materialize.[259] And even if the insurance is provided by a single insurer, the Law Society's experience refutes the OAA's concern. Finally, if compulsory insurance at sufficiently high levels of coverage were adopted then firm incorporation and limited liability could be extended with little risk of uncompensated losses being imposed on involuntary parties. This latter point is made by Professor Prichard in his paper on Incorporation by Professionals.[260]

10. A Self-Insurance Component. The incentive value of the profession itself acting as a partial self-insurer has already been discussed.[261] The motivation to collect, interpret and improve the professional

negligence data is particularly acute when "the cost of our mistakes are paid from our own pockets".[262] It is recommended that a substantial self-insurance component complement the compulsory insurance plans proposed above.

11. Substantial Deductibles. The incentive for continuing competence created by the imposition of civil liability is virtually eliminated if the professional's insurance package has a nominal or non-existent deductible. It is absolutely imperative from a deterrence perspective that the professional insurance plan carry a substantial, uninsurable deductible requirement. It may also be desirable to structure a differential deductible that can be correlated with either the extent of injury or the type of injury. Professor Prichard explains:

> "Although mandatory deductibles can create financial incentives, if the deductible is the same for all maloccurrences, from an incentive point of view, professionals will not distinguish among injuries resulting in damages greater than the deductible limit. As a result, the most serious injuries and considerably lesser ones would presumably be avoided with the same frequency. This could be corrected by correlating the deductible level with the amount of damages, or, less precisely, with the type of injury."[263]

The B.C. Law Society, for example, has injected one differential into its deductible requirements--the

usual $3,000 individual deductible has been raised to $10,000 for any claim arising out of a missed limitation period. It is recommended that professional liability insurance plans carry a substantial and differentiating non-insurable deductible requirement.

12. Experience-Rating. Although the incentive value of individual risk-rating is obvious, the costs would be severe as well. A strictly applied experience-rating could inhibit the early reporting of claims and thus prejudice not only the insurer but the profession in its efforts to compile accurate data.[264] It could also carry disastrous financial consequences for individuals in practice. It is submitted that it is not essential that premiums be individually risk rated if the other recommendations in this Part are implemented.

(iv) Improving the Response of the Profession as a Whole

13. Mandatory Data Disclosure by Insurer. It is imperative that the insurer be required to disclose to the relevant professional body at regular intervals the full incidence and costs of the claims that have been made. The insurer should be required to systematize the data collection in a comprehensive

and understandable way. Extensive accessibility to the claims data is the sine qua non for any effective continuing education or loss prevention program.[265]

14. A Comprehensive Loss Control Program. It is recommended that the accounting and legal professions follow the lead of the architects and engineers and assume a more aggressive attitude toward continuing education and loss prevention. The National Program Administrator's seminar-attendance incentives, loss control bulletins, professional liability handbooks and claims incidence updates are features that deserve serious consideration and, ideally, implementation.

15. Internal Regulation of Incompetence. It is recommended that the disciplinary body for each profession assume a higher profile with respect to individual incidents of professional incompetence. The disciplinary body should have access to any relevant claims data, including individual files. Finally, all transcripts of any malpractice action involving a member of the profession, should be forwarded to the disciplinary body.

(v) Other

16. Firm Structure and Limited Liability. In his study of firm structure and incorporation, Professor Prichard stressed that the corporate form ultimately selected by the POC as most appropriate in the context of professional services should reflect the conclusions reached on such related substantive issues as civil liability.[266] The conclusion reached in this paper can be stated succinctly: civil liability can provide a significant incentive for continuing professional competence *if* the recommendations noted above are implemented; otherwise the mechanism will flounder as a third-best and largely ineffective competence incentive. How is this conclusion relevant to a discussion of corporate form and limited liability? It is our position that the *deterrence* value of civil liability would not be significantly affected by a statutory shift from the traditional notion of joint and several liability to that of limited liability. This is largely the consequence of prevailing market and liability insurance factors. These factors have been extensively explored by Professor Prins in a recent American journal of law reform.[267] The only significant consequence of a shift to limited tort liability will be one of compensation: a limited liability regime will mean a smaller asset

base and thus a smaller compensation fund than would otherwise be available. In order to protect the victims of negligent professional services adequately, limited liability should be permitted only where the professional firm has provided adequate security for financial responsibility. It is submitted that the "third model alternative" suggested in the Model Professional Corporation Supplement be endorsed.[268]

****

TABLE 1

Weighted Average Distribution of Gross Fees For All CA Firms by Selected Client Groups

Businesses with total world-wide sale of	
(1) $0 - $1,000,000	46.4%
(2) $1,000,001 - $25,000,000	24.4
(3) $25,000,001 +	19.7
All Businesses	90.5
Individuals	4.5

****

SOURCE: F. Lazar, M. Sievers and D. Thornton, An Analysis of the Practice of Public Accounting in Ontario, Working Paper #8 prepared for the Professional Organizations Committee, 1978.

Percentage of Gross Fees Earned by
CA Firms of Different Size, by Client Groups

	Number of CAs per firm							
Client group	1	2	3	4-5	6-10	11-25	26-150	151+
Businesses with total world-wide sales of								
(1) $0 - $1,000,000	76.6%	76.0	71.9	67.6	68.8	64.6	41.3	19.6
(2) $1,000,001 - $25,000,000	9.7	13.3	17.4	22.4	19.0	21.9	34.0	30.8
(3) $25,000,001 +	0.9	0.2	0.0	1.3	0.9	2.6	13.0	42.2
All Businesses	87.2	89.5	89.3	91.3	88.7	89.1	88.3	92.6
Federal government	0.4	0.1	0.2	0.1	0.7	0.2	0.0	1.2
Provincial government	0.1	0.2	0.6	1.1	0.1	0.6	1.0	0.2
Local government	0.8	2.2	1.4	1.0	4.6	3.1	0.3	1.4
Individuals	8.7	6.2	5.6	4.8	4.7	3.7	8.3	2.0
Non-profit institutions	2.8	1.9	2.8	1.6	1.2	3.3	2.0	2.6

SOURCE: F. Lazar, M. Sievers and D. Thornton, An Analysis of the Practice of Public Accounting in Ontario, Working Paper #8 prepared for the Professional Organization Committee.

TABLE 2

Number of CA Firms, by Size, That Receive Zero Percent of Their Gross Fees, or Fifty Percent or More of Their Gross Fees From Business Clients of Varying Size or From Individuals

Client group	Number of CAs in firm							
	1	2	3	4-5	6-10	11-25	26-150	151+
Businesses with total world-wide sales of								
(1) $0 - $1 million - A	16	0	0	0	0	0	0	0
- B	223	52	24	24	9	4	1	0
(2) $1 million-$25million - A	188	24	6	4	1	1	0	0
- B	9	0	0	0	0	0	0	0
(3) $25 million + - A	314	92	49	50	23	12	0	0
- B	3	0	0	0	0	0	0	0
Individuals - A	126	25	12	19	4	5	0	1
- B	6	0	0	0	0	0	0	0
Total number of firms	319	93	49	58	27	16	3	5

NOTES: A - Zero percent of fees received in this service category
B - Fifty percent or more of gross fees received in this service category

SOURCE: F. Lazar, M. Sievers and D. Thornton, An Analysis of thePractice of Public Accounting in Ontario, Working Paper #8 prepared for the Professional Organization Committee.

TABLE 3

TABLE 4

ICAO Lloyds-Minet Insurance Plan by Level of Coverage and Number of Firms

Level of Coverage	# of Ontario Firms (1976 Total: 542)	% of Total	# of Ontario Firms (1978 Total: 681)
$ 100,000.	114	21%	143
500,000.	217	40	272
1,000,000.	152	28	191
2,000,000.	43	8	54
5,000,000.	11	2	14
10,000,000.	5	1	7
TOTALS	542	100%	681

SOURCE: ICAO Letter of June 10, 1977 to POC
Interview with J. Adelstein
(ICAO) March 16, 1978

NOTE: In March 1978 only 681 out of approximately 1200 Ontario "units" were insured under the ICAO Lloyds-Minet Plan. No data is available re the other insurers, levels of coverage, etc.

TABLE 4A

The Lloyds-Minet "Self-Rating Table"

Self-Rating Table

To calculate annual premium for required coverage level, complete section (a) AND, if desired, ONE OF (b), (c), (d), (e) or (f) and total. Note: for coverage up to $2,000,000, there is no annual aggregate loss limit (any number of losses or up to $2,000,000 can be incurred). On coverage over $2,000,000, losses in a policy year are limited to the aggregate of the portion of losses exceeding $2,000,000 that do not exceed the amount of your coverage over $2,000,000.

1. (a) Basic coverage $100,000 per loss no deductible

Total number of CICA members in firm	Total annual cost per CICA member
	$
1	212.
2	186.
3	143.
4	133.
5	127.
6	122.
7 - 10	117.
11 - 15	111
16+	106

Total cost for Basic limit

No. of CICA members ..... x $ ..... = $ .....
applicable cost per member for size of firm

2. AND, IF COVERAGE OVER $100,000 IS DESIRED, ONE ONLY OF (b) TO (f)

(b) Additional $400,000 coverage to bring total coverage to $500,000 per loss
No. of Partners ..... x 53. = $ .....
No. of Employed CA's ..... x 32. = $ .....

(c) Additional $900,000 coverage to bring total coverage to $1,000,000 per loss
No. of Partners ..... x 80. = $ .....
No. of Employed CA's ..... x 53. = $ .....

(d) Additional $1,900,000 coverage to bring total coverage to $2,000,000 per loss
No. of Partners ..... x 133. = $ .....
No. of Employed CA's ..... x 80. = $ .....

(e) Additional $4,900,000 coverage to bring total coverage to $5,000,000
(i) $2,000,000 for each and every loss plus
(ii) $3,000,000 each and every loss, and in total, in any policy year in excess of (i) above
No. of Partners ..... x 212. = $ .....
No. of Employed CA's ..... x 106. = $ .....

(f) Additional $9,900,000 coverage to bring total coverage to $10,000,000
(i) $2,000,000 for each and every loss plus
(ii) $8,000,000 each and every loss, and in total, in any policy year in excess of (i) above
No. of Partners: ..... x 292. = $ .....
No. of Employed CA's: ..... x 148. = $ .....

Total annual cost section (a) plus (b), (c), (d), (e) or (f) if required $ _____

Note: All annual costs shown include an Insurance Committee administration charge. Your policy will only indicate the insurance premium before this charge while you will be billed for the total cost as shown.

1-77

SOURCE: CICA Lloyds-Minet Information Brochure: "To Err is Human. . But It Helps to be Insured" (1976)

The ICAO Insurance Plans:
(1) General Security
(2) Lloyds-Minet

LOSS BY ORIGIN	# of Claims	% of Total	$Value	% of Total	Avg.Claim Size	Closed	Open
(1) General Security Plan: Data to December 31, 1973							
1. Defalcations Undetected	6	30%	$33,750.	26%	$ 5,625.	3	3
2. Tax Related	6	30	26,189.	20	4,365.	4	2
3. Alleged Accounting Errors	3	15	50,000.	39	16,667.	0	3
4. Mismanagement	2	10	Nil	Nil	Nil	0	2
5. Conflict of Interest	1	5	18,000.	14	18,000.	0	1
6. Trust Funds Mishandled	1	5	Nil	Nil	Nil	1	0
7. Mortgage Miscalculated	1	5	1,134.	1	1,134.	1	0
(1) Totals	20	100%	$129,073.	100%	Avg.$6453.65	9	11
(2) Lloyds-Minet Plan: Data to January 31, 1978							
1. Alleged Accounting Errors	10	39%	$60,000.	33%	$ 6,000.	1	9
2. Tax Related	4	15	6,500.	4	1,625.	0	4
3. Unidentified at this time	12	46	116,750.	63	9,729.	0	12
(2) Totals	26	100%	$183,250.	100%	Avg.$7048.07	1	25

ICAO Experience Under General Security and Lloyds-Minet: Jan.1/71 to Jan.31/78:

Total # of Claims: 46
Total Reserved Value: $312,323.
Average Claim Size: $6,789.63

****

SOURCES ICAO Letter of October 14, 1977 to POC
Interview with J.Adelstein (ICAO) March 16, 1978

TABLE 5

TABLE 6

Architects and Engineers: Distribution by Client Type

Client Type	Distribution of Client Types (% of all clients) Architectural Firms	Engineering Firms	Mixed Firms
1. Industrial and commercial companies	22	39	34
2. Real estate development companies	20	14	22
3. Non-profit institutions	10	3	6
4. Government (all levels)	21	22	23
5. Individuals	23	6	7
6. Architecture or engineering firms	3	14	6
7. Other - contractors	<1	1	1
8. - mining corporations	0	1	0
9. - other	1	2	1
TOTAL	100	100	100

SOURCE: D. Dewees, S. Makuch and A. Waterhouse, An Analysis of the Practice of Architecture and Engineering in Ontario, Working Paper #1 prepared for the Professional Organizations Committee, 1978, Table III.B.24.

TABLE 7

Architects and Engineers: Client Survey

1. The Sample by Client-Type

(1) Government and Non-Profit Institutions: Residential	3
(2) Government and Non-Profit Institutions: Non-Residential	12
(3) Government: Road and Highway Design	3
(4) Private Sector: Residential	17
(5) Private Sector: Non-Residential	14
(6) Individuals	0
Total Sample	49

2. "Shopping Around"

Responses to Question 8 of this Client Survey indicate that from 86% to 100% of the client-sample made their final selection of firm from a list of alternatives.

Responses to Question 10 of the Survey indicate that the selection was made on the basis of the following major criteria:

(1) References from other organizations;
(2) References from other design firms;
(3) References from prime consultant;
(4) Price;
(5) Specialized capabilities;
(6) Expertise of staff;
(7) Size of firm.

SOURCE: Professional Organizations Committee - Client Survey - Architecture and Engineering (1977).

1. The Basis for Client's Reliance on Architect or Engineer: By Client Type

Specifics	Client Type: Gov't.Res. Arc.	Eng.	Oth.	Govt.Non-Res. Arc.	Eng.	Oth.	Gov't.Road Arc.	Eng.	Oth.	Private Res. Arc.	Eng.	Oth.	Private Non-Res. Arc.	Eng.	Oth.
1. Representative of firm	2	2	1	10	10	4	0	1	0	13	10	2	10	9	3
2. Reg.agency	0	0	0	4	4	1	1	1	0	1	0	0	2	2	0
3. APEO/OAA	1	1	1	4	2	1	2	2	0	0	0	0	3	4	0
4. Prof.ethics	2	2	0	6	6	1	0	0	0	4	3	1	6	5	1
5. Liability insurance	0	0	0	5	3	1	0	0	0	1	1	0	1	1	0
6. Terms of contract	3	3	1	10	9	3	0	0	0	8	8	2	7	7	2
7. Exercise of approval	2	2	1	10	9	2	1	2	0	5	4	0	8	8	2
8. Other	1	1	0	5	5	2	1	2	0	6	6	2	5	6	1

NOTE: - most respondents rarely check other category in firm type
- specific (8) i.e. other - usually client's own efforts to ensure quality

SOURCE: Professional Organizations Committee - Client Survey - Architecture and Engineering (1977) - Question 24.

2. Awareness of Significant Quality Differences Among Firms

Response	Client type: Gov't.Res.	Gov't.Non-Res.	Gov't.Road	Private Res.	Private Non-Res.
1. no	0	1	0	1	6
2. Arch. only	0	1	0	1	0
3. Eng. only	0	0	2	0	0
4. Both (2) and (3)	3	10	1	15	8

SOURCE: Professional Organizations Committee - Client Survey - Architecture and Engineering (1977)

Architects and Engineers: Client Survey

1. Major Problems by Client-Type

Response	Client Type: Gov't.Res.	Gov't.Non-Res.	Gov't.Road	Private Res.	Private Non-Res.	Total	%
1. none	0	3	2	13	7	25	53%
2. cost, time exceeded	0	1	0	0	2	3	6
3. co-ord. problems	0	2	0	1	3	6	13
4. design errors/omission	1	5	1	1	2	10	22
5. fee--quality problems	2	0	0	1	0	3	6
					TOTALS	47	100%

2. Problem Resolution by Client-Type

Response	Client Type: Gov't.Res.	Gov't.Non-Res.	Gov't. Road	Private Res.	Private Non-Res.	Total	%
1. negotiation	0	4	0	0	2	6	25%
2. corrected by client	0	5	1	2	3	11	46
3. corrected by consult.	1	0	0	0	1	2	8
4. termination of contract/relationship	1	0	0	1	1	3	13
5. litigation	1	0	0	1	0	2	8
					TOTALS	24	100%

3. Satisfaction with Resolution

Response	Client Type: Gov't.Res.	Gov't.Non-Res.	Gov't. Road	Private Res.	Private Non-Res.	Total	%
1. yes	3	4	0	0	3	10	43%
2. no	0	1	0	2	1	4	18
3. partly	0	3	1	1	3	8	35
4. not yet resolved	0	0	0	1	0	1	4
					TOTALS	23	100%

SOURCE: Professional Organizations Committee - Client Survey - Architecture and Engineering (1977).

TABLE 10

Architects and Engineers: Client Survey

1. Problem Resolution by "Informed Client/Uninformed Client"

Resolution	Informed	Uninformed
1. negotiation	17%	31%
2. corrected by client	42	46
3. corrected by consultant	8	8
4. termination of relation	8	15
5. litigation	17	-
6. other	8	-
n =	(12)	(13)

2. Satisfaction with Resolution

Response	Informed	Uninformed
1. yes	40%	46%
2. no	30	8
3. partly	20	46
4. not yet resolved	10	-
n =	(10)	(13)

SOURCE: Professional Organizations Committee - Client Survey - Architecture and Engineering (1977).

NOTE: The client is "informed" if:

1. the client has technical knowledge about the architectural or engineering aspects of the project.
2. the client has experience in the building industry, and
3. the client has empathy or appreciation of architectural or engineering input in building design.

The client is "uninformed" if:

The client has limited or no knowledge of the technical and economic aspects of the building industry.

SOURCE: Professional Organizations Committee - Client Survey - Architecture and Engineering (1977).

TABLE 11

Architects' and Engineers' National Program

Level of Coverage by Size of Fee Income of Firm

Fee Income	Estimated Average Limits Selected	
Under $100,000. annually	$ 100,000.	30%
	250,000.	70%
$100,000. – $250,000. annually	$ 100,000.	10%
	250,000.	85%
	500,000.	5%
$250,000. – $500,000. annually	$ 100,000.	5%
	250,000.	85%
	500,000.	10%
$500,000. – $1,000,000. annually	$ 100,000.	1%
	250,000.	75%
	500,000	20%
	1,000,000.	4%
Over $1,000,000. annually	$ 250,000.	30%
	500,000.	45%
	1,000,000.	15%
	2,000,000.	6%
	5,000,000.	4%

Present insurance capacity under the R.A.I.C. and Canadian Engineers sponsored Programs makes limits of up to $5 Million readily available. Limits in excess of $5 Million, up to $10 Million, can be arranged by special reinsurance arrangements, but are not readily available and the cost is somewhat unpredictable.

SOURCE: National Program Administrator, Bulletin No.30, "Selection of Limits and Deductibles," at p.3

TABLE 12

Architects' and Engineers' National Program -- Claims by Origin

Distribution of Claims by Origin (Canada) to Dec.31, 1975

DISTRIBUTION OF CLAIMS BY ORIGIN[1] (CANADA)

TABLE I

Discipline	Design Error I	Design Error $	Inadequate Supervision I	Inadequate Supervision $	Workmanship I	Workmanship $	Miscellaneous I	Miscellaneous $	Totals I	Totals $
*Architectural	18.3	31.1	13.0	15.9	4.2	0.5	7.5	4.8	43.0	52.3
(Architectural excl. roofs)	(13.7)	(26.8)	(9.9)	(12.1)	(3.1)	(0.4)	(4.6)	(4.1)	(31.3)	(43.3)
*Structural	10.4	20.8	5.2	7.2	2.4	0.8	6.5	6.6	24.5	35.4
(Structural excl. roofs)	(5.7)	(10.2)	(3.6)	(4.5)	(1.3)	(0.6)	(3.6)	(3.0)	(14.2)	(18.3)
(Roof Problems)	(9.3)	(14.8)	(4.7)	(5 5)	(2.1)	(0.5)	(6.0)	(5.0)	(22.1)	(25.8)
*Soils	1.1	0.4	0.6	2.5	0.4	0.2	0.5	0.0	2.6	3.0
*Mechanical	4.2	1.2	2.7	0.8	0.8	0.2	2.9	0.8	10.6	3.0
*Other Engineering	1.2	0.2	6.7	3.4	0.4	Nil	11.0	2.7	19.3	6.3
	35.2	53.7	28.2	28.9	8.2	1.7	28.4	14.8	100.0	100.0

I = % of claims incidence
$ = % of total claims cost

To December 31, 1975

Premium and Loss by Project Type

TO DECEMBER 31, 1975

TABLE II

PROJECT TYPE	% Premium	% Incurred Losses	% Permissible
Residential (Low)	13.6%	7.2%	9.5%
(High)	6.9%	8.8%	4.8%
Recreational	5.0%	5.3%	3.5%
Industrial	4.3%	0.8%	3.1%
Commercial	28.2%	17.8%	19.7%
Institutional	33.6%	51.5%	23.5%
Miscellaneous	8.4%	1.7%	5.9%
TOTALS	100.0%	93.1%	70.0%

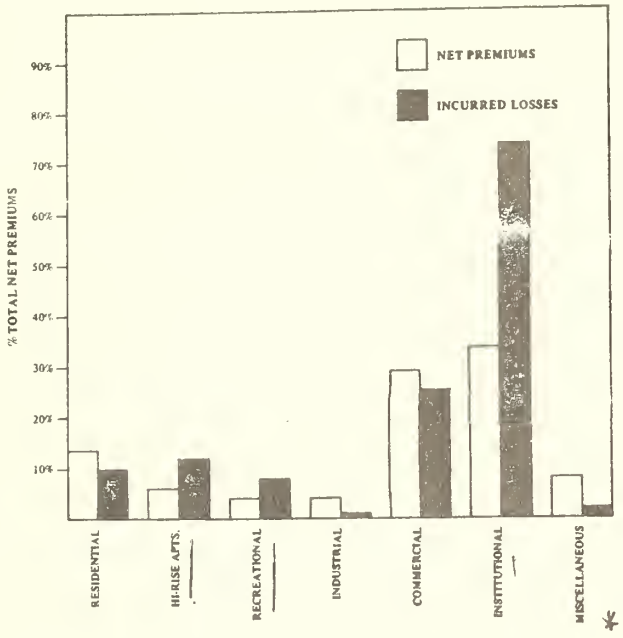
SOURCE: RAIC Annual Report, 1975-76 at p.15

TABLE 13

Architects' and Engineers' National Program -- Premiums/Losses Data

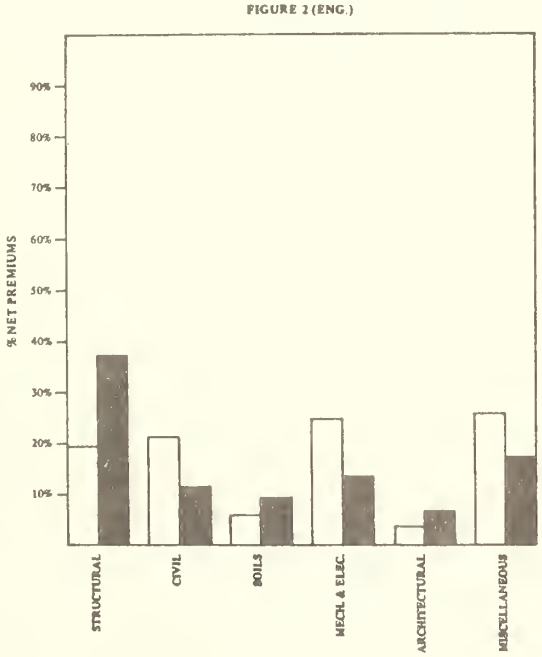
1. Architects' Premiums/Losses by Project-Type to December 31, 1975

FIGURE 1 (ARCH.)



2. Engineers' Premiums/Losses by Project-Type to December 31, 1975

FIGURE 2 (ENG.)



SOURCE: National Program Administrator, Special Bulletin to the Profession, June 1976

Canadian Architects' Professional Liability

[Data to December 31, 1977]

Discipline	Design Error		Inadequate Supervision		Workmanship		Miscellaneous		Totals	
	I	$	I	$	I	$	I	$	I	$
*Architectural	15.6	28.7	9.1	10.9	2.7	1.8	10.7	6.4	38.1	47.9
(Architectural) (excl. roofs)	(11.8)	(21.9)	(6.9)	(8.9)	(2.2)	(1.8)	(8.3)	(4.4)	(29.1)	(37.0)
*Structural	8.1	17.2	3.3	5.0	1.5	0.8	4.7	5.6	17.6	28.5
(Structural) (excl. roofs)	(5.1)	(7.7)	(2.4)	(3.1)	(0.8)	(0.5)	(2.6)	(3.8)	(10.9)	(15.1)
(Roof Problems)	(6.8)	(16.2)	(3.1)	(4.0)	(1.2)	(0.4)	(4.5)	(3.7)	(15.7)	(24.3)
*Soils	0.7	0.4	0.5	1.9	0.3	0.0	0.4	0.0	1.9	2.3
*Mechanical	3.4	1.1	1.9	1.6	0.6	0.3	2.2	1.1	8.0	4.1
*Other Engineering	1.6	1.7	4.9	3.5	0.6	0.1	27.2	11.8	34.4	17.2
TOTALS	29.4	49.1	19.7	22.9	5.7	3.0	45.2	24.9	100.0	100.0

SOURCE: Office of the National Program Administrator

I - % of claims incidence

$ - % of total claims cost

TABLE 14

CANADIAN ENGINEERS' PROFESSIONAL LIABILITY

ANALYSIS OF LOSSES BY ORIGIN - PROGRAM TO DATE [December 31, 1977]

Premium %	Discipline	Design		Supervision		Workmanship		Miscellaneous		Totals	
		I%	$%	I%	$%	I%	$%	I%	$%	I%	$%
19.6	Structural	14.1	25.9	3.8	4.2	2.7	0.5	6.2	2.4	26.8	33.0
22.9	Civil	3.6	5.7	2.8	2.7	1.1	1.4	3.4	1.5	10.9	11.3
4.6	Soils	3.3	6.3	0.3	0.3	0.3	0.1	1.6	1.6	5.5	8.4
10.0	Electrical	1.3	1.1	0.7	0.2	0.2	0.0	0.6	0.1	2.8	1.4
15.4	Mechanical	5.5	4.9	2.4	1.3	0.2	0.1	3.2	2.6	11.3	8.9
3.3	Architectural	2.9	5.5	1.8	2.0	0.6	0.2	1.5	0.4	6.8	8.1
24.2	Miscellaneous	1.4	1.9	4.5	4.7	1.6	1.2	28.4	21.3	35.9	28.9
	TOTALS	32.1	51.3	16.3	15.4	6.7	3.5	44.9	29.9	100.0	100.0
	TOTALS TO END OF 1976	38.8	57.2	19.6	17.0	8.0	7.1	33.6	18.7	100.0	100.0

SOURCE: Office of the National Program Administrator

TABLE 15

YEAR	# P	# C	CLAIMS PER 100m P.	RATIO OF CLAIMS PER POLICIES	AVG. COST INCURRED CLAIMS	PERMISSIBLE INCURRED CLAIM
1966	229	11	9	1:21	$14,301 (F)	$7,797
1967	347	19	10	1:18	2,337 (F)	7,113
1968	416	37	14	1:11	11,381 (3)	4,910
1969	459	30	7	1:15	3,618 (F)	9,557
1970	466	45	8	1:10	8,794 (5)	9,268
1971	503	63	10	1:8	15,237 (8)	6,877
1972	582	60	9	1:10	8,870 (8)	7,846
1973	629	120	16	1:5	10,711 (27)	4,378
1974	614	127	15	1:5	8,970 (30)	4,805
1975	619	125	10	1:5	6,651 (45)	7,152
1976	626	219	11	1:3	3,955 (80)	6,347
1977	707	204	10	1:3	4,000 (158)	7,139
TOTALS		1,060				

SOURCE: Office of the National Program Administrator

(F) - Final closed out year

(#) - Number of claims open

(per 100m P.) - "per $100,000 of Premiums"

CANADIAN ENGINEERS' PROFESSIONAL LIABILITY

CLAIM FREQUENCY AND AVERAGE COSTS

TABLE 5

Year	# P	# C	Claims/ 100m Pm	Ratio C:Pol	Average Cost Incurred Claims	Permissible Incurred Claim
1970	289	27	2.62	1:10.7	$14,427 (#3)	$26,709
1971	381	95	6.40	1: 4.0	13,518 (9)	10,938
1972	452	72	4.33	1: 6.3	9,510 (9)	16,152
1973	587	161	8.49	1: 3.6	12,524 (35)	8,243
1974	626	173	7.52	1: 3.6	11,749 (44)	9,303
1975	790	227	5.58	1: 3.5	16,680 (77)	12,538
1976	871	313	5.37	1: 2.8	7,794 (123)	13,037
1977	981	296	4.62	1: 3.3	7,844 (240)	15,167
TOTALS		1,364				

SOURCE: Office of the National Program Administrator

(#) - Number of claims open

(100m Pm) - "per $100,000 of Premiums"

TABLE 18

Architects' National Program -- Claims History

1. History of Insurance Rates 1970 to 1976

YEAR	Building Costs in Canada		RAIC Avg. Rate Changes		USA Architects Rate Changes (AIA)	
1970	100		100		100	
1971	109	(9%)	110	(10%)	133	(33%)
1972	120.6	(10.7%)	129.3	(17%)	178.2	(34%)
1973	133.8	(11.01%)	134.2	(4%)	213.8	(20%)
1974	148.9	(11.3%)	152.1	(13%)	265.2	(24%)
1975	176.3	(18.4%)	178.4	(17%)	461.3	(76%)
1976	(Projected)		278.1			

2. Summary of Number of Claims (Canada)

	No. of Claims
Under $1000	264
$1000 to $5000	125
$5000 to $10,000	88
$10,000 to $50,000	66
$50,000 to $100,000	12
More than $100,000	10
	565

SOURCE: RAIC Letter to the Profession, September 19, 1975

TABLE 19

Architects' National Program -- Claims Distribution by Region

Distribution of Losses/Premiums by Region

	# of Claims	% of Losses	% of $Premiums
Atlantic	19	4.3%	3.8%
Quebec	245	37.9	36.9
Ontario	160	29.0	34.3
Manitoba/Saskatchewan	20	8.4	5.2
Alberta	66	9.4	9.3
B.C.	55	11.0	10.5
CANADA	565	100.%	100.%

SOURCE: RAIC Letter to the Profession, September 19, 1975.

TABLE 20

Architects' and Engineers' Liability Insurance: The U.S. Experience

TABLE I
ARCHITECTS AND ENGINEERS
PROFESSIONAL LIABILITY INSURANCE*
AVERAGE CLAIM VALUE
BASE YEAR – 1960

Year	Average Claim Value
1960	100.0%
1961	69.9%
1962	106.1%
1963	89.9%
1964	87.4%
1965	90.0%
1966	121.2%
1967	119.9%
1968	125.6%
1969	146.0%
1970	155.8%

*Table provided by Victor O. Schinnerer, Inc., Administrator of AIA-NSPE Insurance Program.

The average claim value is the average amount of claim payments and claim expenses of each claim occurring in each year of the program.

The results include all insured firms (approximately 10,000 firms as of 1971) and are expressed as percentages of the base year of 1960 to reflect the upward trend of the average claim.

TABLE II
ARCHITECTS AND ENGINEERS
PROFESSIONAL LIABILITY INSURANCE*
FREQUENCY OF CLAIMS PER 100 FIRMS

Calendar Accident Year	Frequency Per 100 Firms
1960	12.7
1961	13.1
1962	14.6
1963	13.2
1964	15.4
1965	17.6
1966	17.7
1967	18.8
1968	18.7
1969	20.0
1970	20.6

*Table provided by Victor O. Schinnerer, Inc., Administrator of AIA-NSPE Insurance Program.

Frequency of claims per 100 firms is the average number of claims incurred by each 100 firms.

SOURCE: Shear, "Professional Liability Problems Among Architects, Engineers, Lawyers and Accountants", in Report of the Secretary's Commission on Medical Malpractice (U.S. Department of H.E.W.: 1973) at p.639.

TABLE 21

Architects' and Engineers' Liability Insurance: The U.S. Experience

TABLE III
ARCHITECTS AND ENGINEERS
PROFESSIONAL LIABILITY INSURANCE*
ULTIMATE INCURRED LOSS
BASE YEAR - 1960

Year	Ultimate Incurred Loss
1960	100.0%
1961	92.3%
1962	222.5%
1963	173.3%
1964	192.0%
1965	227.2%
1966	318.5%
1967	356.0%
1968	398.1%
1969	566.7%
1970	693.2%

*Table provided by Victor O. Schinnerer, Inc., Administrator of AIA-NSPE Insurance Program.

TABLE IV
ARCHITECTS AND ENGINEERS
PROFESSIONAL LIABILITY INSURANCE*
AVERAGE PREMIUM RATE LEVEL INCREASES
BASE YEAR - 1960

Year	Premium Rate Level
1960	100.0%
1961	100.0%
1962	130.5%
1963	134.0%
1964	142.8%
1965	142.8%
1966	142.8%
1967	157.8%
1968	236.7%
1969	284.0%
1970	391.9%

*Table provided by Victor O. Schinnerer, Inc., Administrator of AIA-NSPE Insurance Program.

The above table illustrates the cumulative percentage rate increases for the period shown.

SOURCE: Shear, "Professional Liability Problems Among Architects, Engineers, Lawyers and Accountants", in Report of the Secretary's Commission on Medical Malpractice (U.S. Department of H.E.W.: 1973) at p.640.

TABLE 22

Lawyers: Distribution by Client-Types and Size of Firm

Percentage distribution of law firms' clients by type of client, and size of firm, Ontario, 1976

Type of Clients	Firm Size (No.of Lawyers)			
Total (N = 1809)	1	2-4	5-9	10+
Public corporations	3	4	8	16
Non-public corporations and unincorporated business	17	21	30	42
Legal Aid recipients	14	11	8	4
Other individuals	61	60	48	33
Government and non-profit	3	3	5	5
Other	1	1	1	0

SOURCE: See Chapter V, "Economic Analysis of the Market for Lawyers' Services: Supply of Lawyers' Services" in Division of Functions in the Legal Profession: Paraprofessionals and Specialists, (Professional Organizations Committee, 1978), p. 87.

TABLE 23

Client Survey: Law -- Individuals

Distribution of Users of Legal Services by Frequency of Use (frequency & percentage)

Frequency of Use	Frequency	Percentage
More than twice a year	19	26.0
Once or twice a year	14	19.2
Once or twice in five years	34	46.6
Other	5	6.8
No answer	1	1.4
N =	73	100.0

NOTE: Of the 73 individuals surveyed, only 19 or 26% used a lawyer more than twice a year.

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), Table 8.

TABLE 24

1. Client Survey: Law -- Individuals

Distribution of Users of Legal Services by Source of Information (frequency & percentage) N = 72

Sources	Frequency	Percentage
Friends	38	52.8
Family	9	12.5
Business associates	18	25.0
Legal referral service	2	1.1
Legal aid	6	8.3
Other	16	22.2
	89	

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), Table 14.

2. Client Survey: Law -- Businesses

Sources of Information About Lawyers

	Percentage
(a) Colleagues (business associates)	33.3
(b) Other legal firms	20.0
(c) Own legal department	4.4
(d) Friends	46.7
(e) Legal Referral Service	0
(f) Other (please specify)	0

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), pp.45-46.

Client Survey: Law -- "Shopping Around"/Available Information

(1) Individuals

(a) 48.6% of the sample had only one lawyer in mind and used that lawyer; only 15.7% called more than one lawyer prior to selection.

(b) Distribution of the users of legal services by type of information which the person knew before selection of a lawyer. (Note: Respondents could check more than one item.)

Type of Information	Frequency	Percentage
Lawyer who was expert in related field	28	38.4
Information about fees	13	17.8
Information about personal attributes	23	31.5
Names of lawyers located close to home	15	20.5
Other (satisfaction experienced by friends, relatives, or business associates, success rate)	21	28.8
No response	5	6.8

N = 73

(c) Distribution of Sample of Users of Legal Services by Types of Information which would have been used had it been available.

Type of Information	Frequency	Percentage
Information about fees	31	42.5
Names of experts	48	65.8
Information as to personal attributes	30	41.1
Other (satisfaction experienced by friends, relatives, or business associates, success rate)	8	11.0
No response	6	8.2

N = 73

****

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), Tables 11 and 13.

TABLE 26

Client Survey: Law -- "Shopping Around"/Available Information

Business Clients

(a) 73% of the business sample did "shop around" before selecting a law firm.

(b) Information Requested from Firms Contacted.

	Percentage
(a) Fees (prices charged)	54.5
(b) Specialization	63.6
(c) Location	27.3
(d) Availability	63.6
(e) Other (please specify)	0

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), p.46.

(c) Data Re Desirability for More Information

65.5% of the sample would have preferred more information with respect to --

Fees	74%
Qualifications	53%
Area of Specialization	68%

****

Client Survey: Law -- Discussion re Legal Fees

(1) Individuals

65.7% of the sample did not discuss fees prior to their selection of a lawyer and 47% never discussed fees. Of the 45% that did discuss legal fees, over 10% did so after the final bill was presented.

> In the section on the Economic Analysis of the Market for Legal Services of the "Division of Functions-Law" Paper, Janet Yale states: "In general belief that all lawyers charge high fees, coupled with a lack of information about fee levels may stop individuals from searching for a cheaper lawyer or indeed from feeling that they have been overcharged. In addition, if they do not know how fees are determined, clients have little way of judging the appropriateness of prices charged."

(2) Business Clients

Stage at which Clients Discussed Fees with Lawyers.

		Percentage	
(a)	in preliminary talks with a number of firms	16.3	
(b)	after a firm has been selected but before the actual work has been undertaken	34.0	
(c)	after being billed	31.0	
(d)	never	24.0 -- 71.4%	small business

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), pp.49-51.

NOTE: 86% of the business sample indicated that they had received "good value for their money".

TABLE 28

Client Survey: Law -- Degree of Satisfaction with Lawyer's Services

(1) Individuals

Satisfaction with Service

Do you think your lawyer did:

	Frequency	Percentage
(a) a competent job	52	71.2
(b) an incompetent job	10	13.6
(c) don't know	8	10.9
(d) barely adequate	1	1.3
(e) could have done better	1	1.3
(f) no response	1	1.3

N = 73

No response = 1 = 1.3% of the sample.

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), p.36.

(2) Business Clients

Only 27% of this sample changed lawyers in the past five years and of these only 20% did so for reasons of dissatisfaction with lawyer's services. "The high incidence of satisfaction among business clients can be attributed in part to the effectiveness of the search engaged in by this client group."

SOURCE: See "Economic Analysis of the Market for Lawyers Services" in the "Division of Functions-Law" Paper.

****

TABLE 29

Client Survey: Law -- Nature of Complaints about Lawyers' Services

(1) Individuals

(Recall Table 28, supra, that only 27.4% were dissatisfied with their lawyer's work).

Distribution of those who complained about the quality of service received by the nature of the complaint (frequency and percentage) N = 19

Nature of Complaint	Frequency	Percentage
Lawyer did not communicate as to progress of case	10	52.6
Lawyer was slow in dealing with the case	12	63.2
Lawyer did not communicate in understandable language	2	10.5
Lawyer did not consult with client in making decisions	6	31.6
Lawyer's advice was incorrect	7	36.8
Other	9	47.4

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), Table 23.

TABLE 30

Client Survey: Law -- Courses of Action Re Complaints

(1) Individuals

Distribution of the Sample who used Legal Services by the courses of action which could be taken if there were a complaint about the quality of services rendered (frequency and percentage) N= 73

Possible courses of action	Frequency	Percentage
Law Society of Upper Canada	21	28.8
See another lawyer	11	15.1
Court	1	1.3
Talk with lawyer/senior partner	15	20.5
Attorney-General's Office/Crown	4	5.4
Don't know	15	20.5
Change lawyers	2	2.7
Legal Aid	2	2.7
Newspaper complaints column	3	4.1
Can't do anything	6	8.2
Better Business Bureau	1	1.4
No response	12	16.4

SOURCE: Professional Organizations Committee - Client Survey - Law (1978), Table 25.

NOTE: Of the individual clients surveyed, over 36% either did not know what courses of action were available to them re unsatisfactory legal services or did not respond. Only 1.3% indicated civil action. Compare to "business clients survey" where 65% indicated that they would consider changing law firms if legal services were unsatisfactory.

TABLE 31

The Law Society of Upper Canada's Errors and Omissions Insurance:
Data to October 31, 1977

1. Number of Claims: 410
   - Closed: 80
   - Open: 330

2. Loss by Origin

(1) Real Estate		48%
(Defective Title Searches)	(22%)	
(Registration Errors)	(19%)	
(Other)	(7%)	
(2) Missed Limitation Period		15%
(3) Commercial Errors		12%
(4) Other (misc.)		25%
		100%

3. Claims' Size
   - Smallest: $ 750.
   - Largest: $3,000,000.
   - Average Claim: 6,697.

4. Claims' Costs Paid and Reserved: $2,745,941.

(1) Cost to Individual Insured:	$1,042,500.
(2) Cost to Law Society	1,401,104.
(3) Cost to Gestas	302,336.

SOURCE: Report of Harry O. Stinton, Claims Manager to the Chairmen of the Standing Committees of the Law Society of Upper Canada, (1977) 11 Law Society Gazette 249

TABLE 32

Law Society of Upper Canada E&O Insurance: Claims History 1972-1975

1. Number of Claims

1972:	235
1973:	320
1974:	429
1975:	485

2. Payouts Per Lawyer in Ontario

1972:	$ 85.
1973:	$181.
1974:	$228.
1975:	$157. (but some claims still open)

SOURCE: F.C. Maltman, Panel Discussion on Errors and Omissions Insurance, (1977) Law Society Special Lectures 105 at 108

A Comparison of Provincial Law Societies' Insurance Schemes

	Group Insurer	Minimum Coverage	Premium	Individual's Deductible	Law Society's Deductible	Stop Loss Agreement?	Stop Loss Aggregate
B.C.	Gestas	$100,000	N/A	$3,000. ($10,000.*)	$25,000	YES	$ 500,000.
Alberta	N/A**	N/A	N/A	N/A	N/A	N/A	N/A
Sask.	Sask.Gov.	$200,000	$90.	$1,000	N/A	N/A	N/A
Manitoba	Gestas	$100,000	$200.	$2,000	$23,000	YES	$ 150,000.
Ontario	Gestas	$100,000	$375.	$5,000	$30,000	YES	$2,000,000.
New Brunswick	Gestas	$100,000	$226.	$3,500	N/A	N/A	N/A
Nova Scotia	Gestas	$100,000	$320.	$2,500	N/A	N/A	N/A
P.E.I.	Gestas	$100,000	$253.	$2,000	N/A	NO	NO
Nfld.	Gestas	$100,000	$246.10	$2,500	N/A	N/A	N/A

SOURCE: Survey of Provincial Law Societies by the Federation of Law Societies of Canada (1977)

*NOTE: As of January 1, 1978, B.C. has imposed a $10,000. individual deductible for any maloccurence attributable to a missed limitations period.

****

** N/A: Data not available.

TABLE 33

TABLE 34

TABLE V
FREQUENCY DISTRIBUTION OF THE PERCENT OF INCREASE IN LEGAL MALPRACTICE INSURANCE RATES DEMONSTRATED BY 52 JURISDICTIONS
BASE YEAR - 1961*

Percent of Increase	1962	1963	1964	1965	1966	1967	1968	1969	1970
Above 300%									1
250%-299%									1
200%-249%									
150%-199%								3	5
100%-149%								6	11
50%-99%					1	1	2	10	8
1%-49%			1	1	11	13	13	14	11
No Increase	52	52	49	49	40	38	37	19	15
Decrease			2	2					

YEAR

Table based on a listing of ISO rates provided by the St. Paul Insurance Companies, St. Paul, Minnesota.

TABLE VI
INCREASES IN LEGAL MALPRACTICE INSURANCE RATES IN 52 JURISDICTIONS BETWEEN 1961 AND 1970

NO INCREASE	UNDER 50% INCREASE	50%-99% INCREASE	100%-149% INCREASE
Idaho	Alabama (43%)	Arizona (51%)	Arkansas (100%)
Kentucky	Colorado (43%)	Georgia (51%)	Florida (100%)
Missouri	Delaware (31%)	Illinois (57%)	Iowa (100%)
Nevada	District of Columbia (43%)	Maine (86%)	Minnesota (100%)
North Carolina	Indiana (29%)	Michigan (86%)	New Mexico (100%)
North Dakota	Kansas (43%)	Nebraska (51%)	New Jersey (129%)
Oklahoma	Massachusetts (40%)	Ohio (86%)	Vermont (100%)
Puerto Rico	Mississippi (14%)	Pennsylvania (86%)	Virginia (100%)
Rhode Island	Tennessee (40%)		Washington (111%)
South Carolina	West Virginia (43%)		Wisconsin (143%)
South Dakota	Wyoming (14%)		Hawaii (100%)
Texas			
Utah			
New Hampshire			

150%-199% INCREASE	200%-299% INCREASE	300% INCREASE OR MORE
Alaska (186%)	California (275%)	Oregon (300%)
Connecticut (186%)		
Louisiana (186%)		
Maryland (174%)		
New York (154%)*		

*Except for New York City where increase was 180%

SOURCE: Shear, "Professional Liability Among Architects, Engineers, Lawyers and Accountants", in Report of the Secretary's Commission on Medical Malpractice (U.S.Dept.of H.E.W.:1973) at p.643.

TABLE 35

Malpractice Insurance Rates: An Inter-Professional Comparison (U.S.)

MALPRACTICE INSURANCE RATES FOR LAWYERS, ARCHITECTS ENGINEERS; PHYSICIANS, SURGEONS, AND DENTISTS SHOWN AS PERCENTAGES OF 1962 RATES FOR EACH PROFESSION

	LAWYERS	ARCHITECTS/ ENGINEERS	PHYSICIANS	SURGEONS	DENTISTS
1962	100%	100%	100%	100%	100%
1964	99.0%	109.4%	115.8%	135.5%	100.3%
1966	106.9	109.4	134.0	157.1	115.9
1968	109.8	181.4	217.6	204.2	121.0
1970	170.7	300.3	540.0	673.9	164.4
1972	*	439.3	667.7	826.7	177.8

NOTES:

1. Accountants have not been included because nationwide information was not available.
2. Dentists were included as the non-physician health care profession is considered to have the most serious malpractice problem.

SOURCE: Shear, "Professional Liability Among Architects, Engineers, Lawyers and Accountants", in Report of the Secretary's Commission on Medical Malpractice (U.S. Dept. of H.E.W.: 1973) at p.643.

FOOTNOTES

1. For factual background, see Appendices A, B, C, and D to the Research Directorate's Staff Study, History and Organization of the Accounting, Law, Architectural, and Engineering Professions (1978), respectively. The leading Canadian article on professional civil liability as a competence incentive is Prichard, "Professional Civil Liability and Continuing Competence", in Klar (ed.) Studies in Canadian Tort Law (1977). Also see Kretzner, "The Malpractice Suit--Is It Needed?" (1973) 11 Osgoode Hall L.J. 55. The following American literature is also relevant: Calabresi, "The Problem of Malpractice: Trying to Round Out the Circle" (1977) 27 U.T.L.J. 131; Reder, "An Economic Analysis of Medical Malpractice" [1977] J. of Leg.Stud. 267; Prins, "Accident and Malpractice Liability of Professional Corporation Shareholders", (1977) 10 U. Mich. J. Law Reform 364.

2. Prosser and Wade, Handbook of the Law of Torts (5th ed., 1971) at 161.

3. Fleming, The Law of Torts (4th ed., 1971) at 109.

4. See Reiter, Discipline As A Means of Assuring Continuing Competence in the Professions, Working Paper #11 prepared for the Professional Organizations Committee (1978).

5. Supra note 1 at 381.

6. See Prichard, supra note 1 at 377-380 and accompanying footnotes.

7. Senator Daniel Inouye, (1975) 121 Cong. Rec. S.414, quoted supra note 1 at 378.

8. Ibid.

9. Government of Ontario, Committee on the Healing Arts, Report Vol. 3 (Ontario: Queen's Printer, 1970) at 70.

10. Waxman Report, California Assembly Select Committee on Medical Malpractice (1974) quoted supra note 1 at 378. Also see Roemer, "Controlling and Promoting Quality in Medical Care", (1970) 35 Law and Contemp. Prob. 284 at 297.

11. Schwartz and Skolnick, "Two Studies of Legal Stigma", (1962) 10 Social Problems 133.

12. Reder, supra note 1.

13. Reder, supra note 1 at 291.

14. See Prins, supra note 1, at 389-394. Also see Havighurst, "Medical Adversity Insurance--Has Its Time Come?", [1975] Duke L.J. 1233 at 1234-1236 and Keeton, "Compensation for Medical Accidents" (1973) 121 U.Pa. L.Rev. 590.

15. Keeton, supra note 14, at 616.

16. Posner, Economic Analysis of Law (2nd ed.) at 34.

17. Calabresi, supra note 1, at 136.

18. Ibid., at 134.

19. Kretzner, supra note 1, at 69.

20. See Reiter supra note 4, Part H - Conclusion: Proposals for Reform.

21. See Huszagh and Molloy, "Legal Malpractice: A Calculus for Reform", (1977) 37 Montana L.R. 279 at 324.

22. Illich, The Right to Useful Unemployment and Its Professional Enemies (1978) at 88.

23. Reiter, supra note 4 , especially at pp. 258-274.

24. Huszagh and Molloy, supra note 21 at 345.

25. See Prichard, supra note 1 at 385.

26. Ibid., at 392.

27. This phenomenon has a particular relevance for the medical profession. See generally: S.G.M. Grange, Q.C. "The Silent Doctor v. The Duty to Speak", (1973) 11 Osgoode Hall L.J. 81. See also, R.E. Dedmon, "Problems Shared in Common by Doctors and Lawyers", (1976) 49 Wisc. Bar Bull. 49.

28. Lamphier v. Phipos (1838) 8 C.& P. 475 at 478. Also see Crits v. Sylvester [1956] O.R. 132 at 143.

29. Glos, "Note on the Doctrine of Professional Negligence" (1963) 41 Can. Bar Rev. 140 at 142.

30. This point is discussed by Prins, supra note 1, at 373-375.

31. See Atiyah, "Accident Prevention and Variable Premium Rates for Work-Connected Accidents" (1975) 4 Ind. L.J. at 1 and 89.

32. See Prichard, supra note 1, at 388.

33. The need for mandatory data disclosure is discussed in Note, "Improving Information on Legal Malpractice" (1972-73) 82 Yale L.J. 590.

34. See Appendix A to Research Directorate's Staff Study, supra note 1

35. Figure from the Public Accountants Council for the Province of Ontario.

36. The 1975-76 membership in the ICAO was 11,334. Of these 5,119 were in practice as public accountants. See Appendix A to Research Directorate's Position Paper, supra note 1

37. Shear, "Professional Liability Problems Among Architects, Engineers, Lawyers and Architects", in U.S. Dept. of Health, Education and Welfare, Report of the Secretary's Commission on Medical Malpractice (1973) at 637.

38. "Accountants: Cleaning Up America's Mystery Profession", U.S. News and World Report, December 19, 1977 at 39-41.

39. Ibid. In 1977 there were nearly 180,000 C.P.A.'s in the U.S. Course enrollments have doubled in five years. The profession is increasing its size at the rate of 10% per year.

40. Shear, supra note 37 at 637-640; supra note 38 at 39.

41. Supra note 38 at 40-41.

42. Rep. John E. Moss, "Congress Probes Regulation of Accounting", Fed. Sec. Law Reports - No.737 (1978).

43. ICAO, Report of the Special Committee on Professional Incorporation and Professional Liability (1970) at 7.

44. See infra Part C.

45. Durable Tire v. Earle, [1960] 26 D.L.R. (2d) 490; Toromont Industrial Holdings Ltd. v. Thorne, Gunn (1976), 10 O.R. (2d) 65; Haig v. Bamford, [1977] 1 S.C.R. 466; Sodd Corp. v. Tessis (1977), 17 O.R. (2d) 58.

46. Appendix: Table 1.

47. Appendix: Table 2.

48. See Professional Organizations Committee - Client Survey - Accounting (1977).

49. Ibid.

50. Ibid.

51. The arguments are canvassed quite extensively by Prichard, supra note 1, at 386-387. Also see Epstein, "Medical Malpractice: The Case for Contract" [1976] A.B.F. Research J. 87 at 133-134: "Contingent fees allow expensive and difficult cases to be brought by plaintiffs who have limited resources of their own. These cases will in many instances simply not be brought, no matter how worthwhile, if the percentage of recovery awarded to lawyers is limited by public regulation. . . . The compensation to attorneys who work on contingent fees does not seem excessive if the risk they bear is taken into account."

52. See infra Parts C.2 and C.3.

53. Supra, note 43 at 15. For a general discussion see Hoyt, "Professional Negligence", [1973] L.S.U.C. Special Lectures; Nelson, "The Source of Professional Liability: Tort or Contract", [1975] L.S.U.C. Special Lectures; Gormley, "Accountants Professional Liability --A Ten Year Review", (1974) 29 Bus. Lawyer 1205; Adelberg, "Accountants Legal Liability" (1974) 21 Nat. Pub. Acc't. 12.

54. Supra note 43 at 3.

55. Adams,"Lessening the Legal Liability of Auditors", (1976-77) 32 Bus. Lawyer 1037 at 1040.

56. In Re Kingston Cotton Mill Co. [1896] 2 Ch. 279 at 288.

57. [1977] 1 S.C.R. 466.

58. Ibid., at 475.

59. Supra note 57.

60. [1964] A.C. 465.

61. Supra note 57 at 476, and 482 per Dickson, J.

62. See the case comments by Brown, (1977) 15 Osgoode Hall L.J. 474 and Timbrull, (1977) 2 Can. Bus.L.J. 68.

63. Supra note 57.

64. The reference here is to Mr. Justice Cardozo's expression of fear in Ultramares Corp. v. Touche, Niven & Co. (1931) 174 N.E. 441 at 444.

65. ICAO, supra note 64 at 4.

66. Brown, supra note 62, at 484. The pros and cons of such an extension of third party liability are discussed in Besser, "Privity--An Obsolete Approach to the Liability of Accountants to Third Parties", (1976) 7 Seton Hall L.R. 507 and Dawson, "Auditors Third Party Liability: An Ill-Considered Extension of the Law" (1970-71) 46 Wash. L.R. 675.

67. Limitations Act, R.S.O. 1970, c.246, s.45(1)(g).

68. See generally, Williams, Limitations of Actions in Canada (1972) at 7.

69. See Nelson, "The Source of Professional Liability: Tort or Contract", [1975] L.S.U.C. Special Lectures.

70. See Fleming, The Law of Torts 4th ed. 1971 p.105; Salmond, The Law of Torts, 16th ed. 1973, p.612; Winfield on Tort, 9th ed. 1971, p.660. See also Long v. Western Propeller Co. (1968), 63 W.W.R. 146, 67 D.L.R. (2d) 345 (Man. C.A.); Watson v. Winget, Ltd., 1960 S.L.T. 321 (H.L.); Brook Enterprises Ltd. v. Wilding, [1973] 5 W.W.R. 660, 38 D.L.R. (3d) 472 (B.C.).

71. Supra, Part B.2(3).

72. Ontario C.G.A.'s have a non-compulsory group insurance plan available through Johnson, Higgins, Willis and Faber Ltd. (Vancouver). However, only 70 C.G.A.'s are licensed to practice public accounting in Ontario. Supra note 35. Thus, our focus is primarily restricted to Ontario C.A.'s.

73. See infra sub-part (4).

74. "Firm" is understood as including branch offices.

75. Appendix: Table 4. The ICAO Report, supra note 43, adds the following at 8:

> "As would be expected, on the average the coverage tends to increase with the size of the firm, but the actual coverage of different firms varies widely from the average. For instance, five firms with a total of less than 5 persons carry the maximum coverage of $1,000,000. On the other hand, of the five largest firms (with 45-86 persons) only two carry the maximum amount of insurance. On the surface, and not knowing the nature of the practices, it would seem many members of the Ontario group plan may be under-insured. Still, inadequate insurance is better than no insurance, and there are probably still many members in practice who carry no insurance at all. We have not made any studies to determine how extensive insurance coverage is among practising firms."

76. See Lloyds-Minet brochure: "To err is human . . . but it helps to be insured!" at 3.

77. See Kroll,"The Claims-Made Dilemma in Professional Liability Insurance" (1974-75) 22 U.C.L.A. Law Rev. 925.

78. Appendix: Table 4A.

79. Ibid.

80. Supra note 76 at 1.

81. Interview with J. Adelstein, ICAO Insurance Committee, March 16, 1978.

82. Appendix: Table 5.

83. Supra, note 81.

84. Supra, Part B.2.

85. Supra, note 43, at 9.

86. Ibid., at 8.

87. Ibid.

88. Supra, note 81.

89. Letter of J. Adelstein, ICAO Insurance Committee, dated October 14, 1977 to POC.

90. Supra, note 81.

91. See Reiter, supra note 4, at 113-133.

92. These points are amplified in Reiter, supra, note 4 at 133-140.

93. See Appendix C to Research Directorate's Staff Study, supra note 1; and Appendix D to Research Directorate's Staff Study supra note 1

94. One commentator has noted that while the majority of cases involve architects, "in practically all the situations, the word engineer could be substituted for architect when an engineer is furnishing similar service." See Bell, Professional Negligence of Architects and Engineers, (1958) 12 Vand. L.Rev. 711.

95. Professional liability insurance is mainly the concern of those members of the professions that are engaged in private practice. With respect to engineers, only 10-12% of the APEO membership (approximately 43,000 in 1978) carry on a private practice. The proportion is considerably higher for Ontario architects. The liability insurers do provide an insurance package for the "employee" as well. As the national insurer's informational brochure explains:

> "In the case of Engineers and Architects employed by consultants, the firm can buy professional liability insurance which provides coverage for all employees and former employees.
>
> The majority of Engineers and many Architects, however, are employed by others, such as manufacturing concerns, mining companies, various levels of government, utilities, etc., and generally these employers cannot obtain professional liability insurance. Furthermore most general liability policies specifically exclude professional liability.
>
> Thus, there is no protection afforded to the individual Engineer or Architect for claims made by Third Parties arising out of his professional services. Recent court decisions are tending to increase the responsibilities of professionals in all fields in favour of the consumer, and as a result the consumer is becoming increasingly aware of the possibilities afforded by a suit."

The National Program Adminsitrator offers liability insurance for the individual "employee" as well as the "consultant". Our focus will be primarily on the latter.

96. Discussed infra, Part C.2(3).

97. See Special Bulletin: Hard Facts About the RAIC and Canadian Engineers Professional Liability Insurance Programs (N.P.A.: June 1976).

98. Appendix: Table 16.

99. Appendix: Table 17.

100. Appendix: Tables 16 and 17.

101. Appendix: Table 20.

102. Appendix: Table 21.

103. Supra, note 97 at 1.

104. An increase in litigational activity or average claim size will not affect competence where, for example, the impact is dissipated through the mechanism of a non-differentiating liability insurance plan. See infra sub-part (3).

105. Engineers: Carl M. Halverston Inc. v. Robert McLellan Ltd., (1972) 29 D.L.R. 3d 455; Surrey v. Church, (1977) 76 D.L.R. 3d 721; Dominion Chain Co. v. Eastern Construction Ltd. et al., (1976) 12 O.R. 2d 201; Brantford v. Kemp, [1960] 23 D.L.R. 2d 64. Architects: Dabous v. Zuliani (1976) 12 O.R. 2d 230; Pratt v. St. Albert P.S.S.D. [1969] W.W.R. 62; Sealand of the Pacific v. Robert C. McHaffie Ltd. (1974), 51 D.L.R. 3d 70]; Vermont Construction v. Beatson, [1975] 8 N.R. 271; Jenkins v. LeClair (1976) 15 N.S.R. 2d 473; Colchester Developments Ltd. v. Leslie R. Fairn & Associates (1975) 11 N.S.R. 2d 389; Diemer v. Ryan, [1973] 4 N.& P.E.I. Rep. 575; Brook Enterprises Ltd. v. Wilding and Jones et al., [1973] 5 W.W.R. 660.

106. Supra Part C.1(1).

107. D. Dewees, S. Makuch and A. Waterhouse, An Analysis of the Practice of Architecture and Engineering in Ontario, Working Paper #1 prepared for the Professional Organizations Committee (1978). See Appendix Table 6.

108. Appendix, Table 6.

109. Ibid.

110. Appendix, Table 7.

111. See Professional Organizations Committee, Survey of Architecture and Engineering Firms (1977).

112. Appendix, Table 7.

113. Appendix, Table 8.

114. Supra note 51.

115. Prichard, supra note 1, at 387.

116. Ramsay and Penno v. The King, [1952] 2 D.L.R. 819, per Hyndman D.J. at 823. For a general discussion of the architect's and the engineer's liability for professional malpractice see the literature supra note 53 . Also see Sos, "Liability of Architects for Defective Design", (1970) 19 Cleveland State L.R. 184; Witherspoon, "Architects and Engineers: Tort Liability", (1967) 16 Defense L.J. 409; Davidson, "The Liability of Architects", (1977) 13 Trial 20.

117. Colchester Developments Ltd. v. Leslie R. Fairn and Associates, (1975) 11 N.S.R. 2d 389 at 390.

118. See Appendix C to Research Directorate's Staff Study supra note 1; and Appendix D to Research Directorate's Staff Study, supra note 1

119. See Appendix C to Research Directorate's Staff Study, supra note 1. Also see N.P.A. Bulletin No. 7 [on file with the Professional Organizations Committee.]

120. N.P.A. Bulletin No.30 (August, 1976).

121. Shear, supra note 37 at 638.

122. N.P.A. Bulletin No.12: "Professional Liability Loss Control Program".

123. Ibid.

124. Outerbridge, "Professional Negligence and Errors and Omissions Insurance", [1977] L.S.U.C. Special Lectures at 88.

125. Supra note 97 at 3.

126. See for example, Jenkins v. LeClair, (1976) 15 N.S.R. 2d 473.

127. Miller v. DeWitt, (1967) 226 N.E. 2d 630. For a discussion of third party liability see Crishom, "Liability of Architects and Engineers to Third Parties", (1975-76) 26 Fed. of Ins. Counsel Quarterly 177.

128. See Brook Enterprises Ltd. v. Wilding and Jones et al [1973] 5 W.W.R. 660 and Surrey v. Church, supra note 105.

129. Supra note 97 at 3.

130. Supra Part C.1(2)(iii).

131. Ibid

132. Supra note 105.

133. Supra notes 68 and 69.

134. R.S.O. 1970, c.366. See Appendix D to Research Directorate's Staff Study, supra note 1

135. Ibid.

136. See Appendix D to Research Directorate's Staff Study, supra note 1

137. R.S.O. 1970, c.366, s.28(1)(a).

138. Supra note 105.

139. A tort-based architectural malpractice action would have a six-year limitation period whereas a similar action against a professional engineer would have to be brought within one year: supra note 134.

140. The "consultant" and "individual employee" insurance plans were described supra note 95.

141. POC Interview with Claude Mercier, Deputy National Program Administrator (July 1977).

142. Ibid.

143. Standard clause in RAIC and CCPE Professional Liability Insurance Program.

144. Discussed supra note 77 and accompanying text. Also see N.P.A. Bulletin No.29 (July 1976): "Claims Made" Insurance Can Be a Two-Edged Sword."

145. Appendix C to Research Directorate's Staff Study, supra note 1

146. Appendix, Table 11.

147. National Program Administrator, Handbook of Practice for Architects and Engineers (1977) at 7.52.

148. Ibid., at 7.55.

149. Appendix, Table 18.

150. Appendix, Tables 16 and 17.

151. Appendix, Table 12.

152. Appendix, Table 14.

153. Appendix, Table 16.

154. Appendix, Table 16 and cf. U.S. data in Tables 20 and 21.

155. Appendix, Table 13.

156. Appendix, Table 15 and supra note .

157. Supra note 97.

158. Appendix, Table 17 and cf U.S. data: Tables 20 and 21.

159. Resolution passed at the 1973 OAA Annual Meeting, February 23, 1973.

160. See OAA Letter to Members, February 1, 1974 at 5.

161. Ibid.: Attached Excerpt from Snyopsis of 1974 Annual General Meeting.

162. Ibid.

163. RAIC Annual Report 1975-76 at 14.

164. Supra note 97 at 1.

165. The program appears to be patterned on a similar loss prevention program that was instituted in 1971 by the American Institute of Architects and the National Society of Professional Engineers. See Shear, supra note 37 at 640.

166. Supra note 163 at 14.

167. N.P.A. Bulletin No.34 (April, 1977).

168. Supra note 163 at 16.

169. Supra note 4.

170. See Appendix C to Research Directorate's Staff Study, supra note 1, and Appendix D to Research Directorate's Staff Study, supra note 1

171. Time Magazine, April 10, 1978 at 41.

172. Kierr, "Lawyers Professional Liability Insurance: Quo Vadis", (1976) 43 Insur. Counsel J. 539. The literature on legal professional liability insurance is quite extensive. For an update with respect to the American legal profession see Martin, "Lawyers Professional Liability--A Developing Crisis?", (1976) 43 Insur. Counsel J. 532; Zelle and Stanhope, "Lawyer Malpractice: The Boomerang Principle" (1977) 13 Trial 16; Jericho and Coultas, "Are Lawyers An Insurable Risk?", (1977) 63 ABA Journal 832. Also see Appendix: Tables 34 and 35 for American data.

173. Appendix, Table 32.

174. Stinton, "Errors and Omissions Insurance", (1977) 11 L.S.U.C. Gazette 249 at 252.

175. Appendix, Table 22.

176. Appendix, Table 23.

177. Appendix, Table 25.

178. Ibid.

179. Appendix, Table 27.

180. Appendix, Table 30.

181. Professional Organizations Committee, Client Survey - Law (1978).

182. Appendix, Table 26.

183. Ibid.

184. Appendix, Table 28.

185. Supra note 181 and Appendix, Table 28(2).

186. Poust, "Reasonable Protection for Reasonable Lawyers", (1975-76) 11 The Forum 209 at 215.

187. Supra note 51 and accompanying text.

188. (1974) 53 D.L.R. 3d 27 (Ont. H.Ct.).

189. Ibid., at 34-35. Also see Appendix B to Research Directorate's Staff Study, supra note 1

190. Houghey, "Lawyer Malpractice: A Comparative Appraisal" (1972-73) 48 Notre Dame Lawyer 888 at 899-900.

191. Rondel v. Worsley, [1969] A.C. 191 (H.L.).

192. Ibid.

193. See, for example, Nightingale, "The Negligent Practice of Law in Canada: A Chronicle of Client Frustration" (1977) 41 Sask. L.R. 47 at 50-54; Carey-Miller, "Exemption of An Advocate from Liability for Negligence in Court", (1977) 94 South African L.J. 184; and cf. Catzman, "Comment--Rondel v. Worsley", (1968) 46 Can.Bar.Rev. 505 and Nakles, "Criminal Defence Lawyers: The Case for Absolute Immunity from Civil Liability", (1976-77) 81 Dickson L.R. 229.

194. Laskin, The British Tradition in Canadian Law (1969) at 26.

195. Supra note 191.

196. Banks v. Reid, (1974) 53 D.L.R. 3d 27, per Henry J., at 41-42 .

197. Carthy, "Panel Discussion on Professional Negligence and Errors and Omissions Insurance", [1977] L.S.U.C. Special Lectures 105 at 124.

198. 530 P.2d 589 (1975).

199. 322 A.2d 114 (1974).

200. Biakanja v. Irving, 320 P.2d 16 (1958); Lucas v. Hamm, 364 P.2d 685 (1961). For a discussion of the implications of this judicial expansion see Wallach and Kelley, "Attorney Malpractice in California: A Shaky Citadel", (1970) 10 Santa Clara Lawyer 257; Comment, "New Developments in Legal Malpractice", (1977) 26 Am. Univ. L.R. 408.

201. See generally Note, "Professional Negligence" (1972-73) 121 U.Pa. L.R. 627 and Belden and Lappas, "Professional Liability of Lawyers in Pennsylvania", (1972-73) 44 Pa. Bar Assoc. Quarterly 38 at 49-53.

202. Burman's Beauty Supplies Ltd. v. Kempster, (1975) 4 O.R. 2d 626 (Ont. Co.Ct.).

203. Supra note 57.

204. Supra note 69 and accompanying text. Also see Schwebel v. Telekes, [1967] 1 O.R. 541 (Ont.C.A.).

205. Supra, Part C.1(2)(iii).

206. Supra note 105.

207. Supra notes 132 and 133 and accompanying text.

208. Appendix B to Research Directorate's Staff Study, supra note 1

209. Carthy, Report of the Errors and Omissions Committee, (1977) 11 L.S.U.C. Gazette 226 at 227:

> "A number of members have urged that differential levies be introduced. The Special Committee has considered a number of possible applications of this principal but have so far found that they all involve serious drawbacks which on balance have persuaded them not to recommend their adoption. For example, it has been suggested that those who have caused loss should pay higher premiums. This is much easier to do in automobile insurance than in professional negligence insurance. Without going into the matter in detail, I will mention that the first decision to be made would be to decide whether a member would become liable to pay a higher premium when he reported a claim, when after initial investigation his claim seemed likely to be paid, or after the claim had in fact been settled and paid. Settling on the first alternative would seem arbitrary and heavy handed since it could be applied to members who turn out to be innocent of any error and it could also result in members delaying reporting circumstances which could give rise to a loss so as to avoid the penalty of a higher levy. The second, which might be called hard-claim basis, involves the discretionary judgment and is open to argument and delay. The third or claims paid basis is positive and unarguable but because of the nature of negligence claims, it often takes two to five years after reporting to reach a final settlement."

210. Ibid., at 226.

211. The incidence and size of legal malpractice claims is evidently lower in less populated areas. Appendix, Table 33.

212. Stinton, supra note 174.

213. Appendix, Table 31.

214. Ibid.

215. Ibid.

216. Poust, supra note 186 at 216.

217. Stinton, supra note 174 at 251.

218. Ibid., at 252.

219. Appendix, Table 33.

220. Carthy, supra note 209 at 228.

221. Ibid., at 226.

222. Stinton, supra note 174, at 252.

223. The Professional Organizations Committee has commissioned further research on issues of re-certification and continuing education.

224. Morham, Lawyer's Errors and Omissions Claims: Professional Liability and Loss Control (1977).

225. Ibid., at 5.

226. There are, for example, six checklists: (1) a check-list for compiling information for a solicitor acting for a lessor or lessee; (2) a check-list for reporting letters when acting for a tenant; (3) a partnership agreement check-list; (4) a check-list for each file when acting for the purchaser; (5) a similar one when acting for the vendor; and, (6) a share-holders' agreement check list. The manual has 31 pages in all.

227. Carthy, Letter to Members of the Law Society of Upper Canada: December 5, 1977.

228. Government of Ontario, Ontario Law Reform Commission, Report on the Administration of Ontario Courts, Part III (1973).

229. Ibid., at 203.

230. See L.S.U.C., Intermediate Brief No.6 to Professional Organizations Committee "Continuing Competence," 1978.

231. Ibid.

232. Supra note 209, at 227-228.

233. Prichard, supra note 1 at 389.

234. Ibid., at 391. The "defensive medicine" phenomenon is not restricted to the medical profession. In a submission to the Ontario Law Reform Commission's Class Actions Study, the ICAO provided this description of "defensive auditing":

> "Defensive Auditing. Increased litigation would tend to encourage the adoption of defensive practices by auditors. Auditors might well make exhaustive additional examinations and adopt auditing practices which, if guided solely by their professional judgment, they would deem unnecessary. It is by no means clear that this would improve auditing performance. In performing an audit, the auditor would be expanding his examination to encompass not just what he feels might be significant in the framework of the examination at the time he is conducting it, but also what might be seen as significant if for some reason his audit findings, subsequently, were evaluated by a court with the advantage of hindsight. The added steps motivated by fear of litigation may well deflect the attention of auditors from the ongoing improvement of techniques and from the necessary, orderly evolution of the audit function which arises from the professional's desire to a job well and efficiently. Such cautionary practices would also, unquestionably, increase the costs of auditing."

Supra, note 64, at 9-10.

235. Supra note 228, at 203.

236. Prichard, supra note 1, at 391.

237. These points are discussed by Prichard, supra note 1, at 389-391.

238. Prichard, supra note 1, at 392.

239. Supra note 64, at 8.

240. "Architect Claims Liability Burden is Placed Unfairly on Profession", Globe and Mail, February 14, 1978.

241. See discussion supra notes 108-110 and accompanying text. Also see Appendix, Table 10.

242. At least with respect to the soils engineering discipline: see N.P.A. Bulletin No.35 (July 1977) at 1.

243. See CCPE Letter to All Members: "Professional Liability Insurance for Canadian Engineers", October 16, 1975 at 1.

244. Wallach and Kelley, "Attorney Malpractice in California: A Shaky Citadel", (1970) 10 Santa Clara Lawyer 257 at 257.

245. This refers to the procedural burden placed upon the plaintiff in a legal malpractice suit of showing that his or her action would have succeeded if the lawyer had not been negligent. This procedure is evaluated infra Part E. See notes 254-255 and accompanying text.

246. Prichard, supra note 1, at 393.

247. See, for example, the "data re desirability for more information" in Appendix, Table 26.

248. Huszagh and Molloy, supra note 21, at 345.

249. [1975-76] Lay Observer's Report (U.K.), at para.24.

250. See supra note 51.

251. Prichard, supra note 1 at 387.

252. Ministry of the Attorney General of Ontario, Discussion Paper on Proposed Limitations Act (September, 1977) at 1.

253. This refers to the Discussion Draft of the Proposed Act appended to the Discussion Paper, supra note 252.

254. Prins, supra note 1, at 391 n.153. Also see Note, "Information on Legal Malpractice", (1973) 82 Yale L.J. 590 at 593.

255. Houghey, supra note 190, at 893.

256. Comment, Professional Negligence (1972-73) 121 U.Pa. L.Rev. 627 at 688-689. Also see Wallach and Kelley, supra note 244 at 269-272.

257. See, for example, Calabresi supra note 1 at 131-132 and Epstein, supra note 51 at 137.

258. Shnidman and Salzler, "The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?" (1976) 45 U. Cincinatti L.R. 541 at n.88.

259. This point was made in the context of compulsory liability insurance for architects by an OAA Task Force in 1974. Supra note 159 and accompanying text. And see POC (Steven Wilson) Interview of Mr. Claude Jarrett, Task Force Chairman (August 11, 1977).

260. Prichard, Incorporation by Professionals, Working Paper #5 prepared for the Professional Organizations Committee (1978) at pp. 76-79.

261. Supra Part C.3(4)(ii).

262. Carthy, supra note 209, at 228.

263. Prichard, supra note 1, at 388.

264. See Carthy, supra note 209, at 227.

265. There is an excellent discussion of the need for increased accessibility to claims data in Note, "Improving Information on Legal Malpractice" (1972-73) 80 Yale L.J. 590. The points made are applicable to all four professions under study.

266. Prichard, Incorporation by Professionals, supra note 260 at 2: "The approach taken in this paper is that the corporate form should reflect the conclusions reached on these related substantive issues [i.e. tax implications, mixed firms, civil liability] rather than be determinative of them."

267. See Prins, "Accident and Malpractice Liability of Professional Corporation Shareholders", (1977) 10 U.of Mich.J. of L.Ref. 364.

268. The Model Professional Corporation Supplement was a project of the American Bar Association's Committee on Corporate Laws. See "Professional Corporation Supplement to the Model Business Corporation Act", (1976) 32 Bus.Law. 289. The Model Act and its alternatives are discussed by Prichard, supra note 266, at 72-79.

Ontario

Ministry of the Attorney General

Professional Organizations Committee

102 Bloor Street West
Suite 320
Toronto, Ontario
M5S 1M8
416/965-2740

Chairman:
H. Allan Leal, Q.C.
Committee Members:
Dr. J. Alex Corry
Dr. J. Stefan Dupré
Research Director:
Professor Michael J. Trebilcock
Associate Directors:
Dr. Carolyn J. Tuohy
Dr. Alan D. Wolfson

This Working Paper is one of a series prepared for the Professional Organizations Committee:

#1 Donald N. Dewees, Stanley M. Makuch, Alan Waterhouse, An Analysis of the Practice of Architecture and Engineering in Ontario (1978)

#2 Michael Spence, Entry, Conduct and Regulation in Professional Markets (1978)

#3 Ellen B. Murray, Citizenship and Professional Practice in Ontario (1978)

#4 Peter Aucoin, Public Accountability in the Governing of Professions: A Report on the Self-Governing Professions of Accounting, Architecture, Engineering and Law in Ontario (1978)

#5 J. Robert S. Prichard, Incorporation by Professionals (1978)

#6 Thomas E. McDonnell, The Tax Implications of Permitting the Business of a Profession to be Carried on Through a Corporation in Ontario (1978); Robert Couzin, Memorandum on the November 16, 1978 Federal Budget (1978)

#7 John Quinn, Multidisciplinary Services: Organizational Innovation in Professional Service Markets (1978)

#8 Fred Lazar, J. Marc Sievers, Daniel B. Thornton, An Analysis of the Practice of Public Accounting in Ontario (1978)

#9 Edward P. Belobaba, Civil Liability as a Professional Competence Incentive (1978)

#10 Selma Colvin, David Stager, Larry Taman, Janet Yale, Frederick Zemans, The Market for Legal Services; Paraprofessionals and Specialists (1978)

#11 Barry J. Reiter,
Discipline as a Means of Assuring Continuing Competence in the Professions (1978)

#12 Ellen B. Murray,
Transfer of Professionals from Other Jurisdictions to Ontario (1978)

#13 Katherine Swinton,
The Employed Professional (1979)

#14 David Beatty and Morley Gunderson,
The Employed Professional (1979)

#15 John Swan,
Continuing Education and Continuing Competence (1979)

#16 Theodore Marmor and William White,
Paraprofessionals and Issues of Public Regulation (1979)

Copies are available for personal shopping at the Ontario Government Bookstore, 880 Bay Street, or by writing the Publications Centre, 880 Bay Street, 5th floor, Toronto, Ontario, M7A 1N8.

ISBN 0-7743-3418-5